Supreme Court, U.S.
FILED
JUL 23 2001
OFFICE OF THE CLERK

JUL 23 2001 (22) (24) (24) (21) (21)

Nos. 00-590, 00-511, 00-555, 00-587, 00-602

IN THE

Supreme Court of the United States

AT&T CORP.,

Petitioner,

v.

IOWA UTILITIES BOARD, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF OF AT&T CORP.

MARK C. ROSENBLUM
LAWRENCE J. LAFARO
RICHARD H. RUBIN
AT&T CORP.
295 North Maple Avenue
Basking Ridge, NJ 07920
(908) 221-8410

DAVID W. CARPENTER*
PETER D. KEISLER
DAVID L. LAWSON
STEPHEN B. KINNAIRD
C. FREDERICK BECKNER III
SIDLEY AUSTIN BROWN & WOOD
1722 Eye St., N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

July 23, 2001

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION AND SUMMARY OF ARGUMENT	1
ARGUMENT	
I. TELRIC IS AUTHORIZED BY THE STATUTE AND IS MANIFESTLY NOT ARBITRARY	2
II. THE NETWORK ELEMENT COMBINATIONS RULES ARE VALID	19
CONCLUSION	20

TABLE OF AUTHORITIES

CASES — Page

AT&T Corp. v. *Iowa Utils. Bd.*, 525 U.S. 366 (1999) 3, 19, 20
American Commerical Lines, Inc. v. *Louisville & Nashville R.R.*, 392 U.S. 571 (1968) 15
Bell Atlantic-Delaware, Inc. v. *McMahon*, 80 F. Supp. 2d 218 (D. Del. 2000) 14
In Re Permian Basin Area Rate Cases, 390 U.S. 747 (1968) 15
Southwestern Bell Tel. Co. v. *AT&T Communications of the Southwest, Inc.*, No. A 97-CA-132-55, 1998 WL 657717 (W.D. Tex. Aug. 31, 1998) 14
United States v. *Williams*, 504 U.S. 36 (1992) 19

REGULATIONS

47 C.F.R. § 51.315 ..... 19, 20
§ 51.505(b) 4, 10, 13

ADMINISTRATIVE DECISIONS

A Methodology To Determine Long Run Incremental Cost, 156 P.U.R.4th 1 (Mich. Pub. Serv. Comm'n 1994) 5
Approval of Agreements & Arbitration of Unresolved Issues, 180 P.U.R.4th 521 (Md. Pub. Serv. Comm'n 1997) 14
Bell Atlantic-Virginia, Inc., No. PUC970005, 1998 WL 352676 (Va. State Corp. Comm'n May 22, 1998) 14
Coal Rate Guidelines, 1 I.C.C.2d 520 (1985), *aff'd*, 812 F.2d 1444 (3d Cir. 1987) 7
Depreciation Requirements for Incumbent Local Exchange Carriers, 15 FCC Rcd. 242 (1999) 13
In Region InterLATA Servs. in Kan. & Okla., No. 00-217 (F.C.C. Jan. 22, 2001) 13

TABLE OF AUTHORITIES – continued

Page

Nextlink Pa., Inc., 196 P.U.R.4th 172 (Pa. Pub. Util. Comm'n 1999) 14
Petition for Arbitration, Nos. TO-97-40 & TO-97-67 (Mo. Pub. Serv. Comm'n July 31, 1997).. 13
Rates for Dominant Carriers, 2 FCC Rcd. 5208 (1987) 19

SCHOLARLY AUTHORITIES

W. Baumol, *Economic Theory and Operations Analysis* (4th ed. 1977) 5
W. Baumol & T. Merrill, *Does The Constitution Require That We Kill The Competitive Goose?*, 73 N.Y.U. L. Rev. 1122 (1998) 16
W. Baumol & J. Sidak, *Toward Competition In Local Telephony* (1994) 6, 18
S. Breyer, *Regulation and Its Reform* (1982) 6, 13
C. Horngren et al., *Cost Accounting: A Managerial Emphasis* (10th ed. 2000) 8
1 A. Kahn, *The Economics Of Regulation* (1988) 8, 10, 18
D. Watson & M. Holman, *Price Theory And Its Uses* (4th ed. 1977) 4

OTHER AUTHORITIES

Australian Competition & Consumer Comm'n, *Access Pricing Principles – Telecommunications* (1997) 5
Commission of the European Communities, *Commission Recommendation on Interconnection in a Liberalised Telecommunications Market*, 1997 C(97)3148 ..... 5, 6, 7

TABLE OF AUTHORITIES – continued

Page

1 Financial Accounting Standards Bd., *FAS No. 89: Financial Reporting and Current Prices, in Original Pronouncements: Accounting Standards as of June 1999* (1999) 6

Infocomm Dev. Auth. of Singapore, *Appendix 1: Interconnection/Access In A Fully Liberalized And Developed Convergent Environment, in Second Consultation June-30th* (2000) 5

Oftel, *Access to Bandwidth: Indicative Prices and Pricing Principles* (2000) 7

INTRODUCTION AND SUMMARY OF ARGUMENT

1. The LECs' respondents' briefs have not defended the Eighth Circuit's judgment on TELRIC. The Eighth Circuit invalidated only the subsection of TELRIC that requires that rates be based on efficient replacement costs, and it upheld TELRIC's ban on "consider[ing]" the LECs' historical book costs. As is now undisputed, these holdings would require that network element rates be based on either (1) the universally discredited method of determining the costs of reproducing obsolete technology at today's prices or (2) a short run incremental cost method in which LECs recover their operating expenses but receive no recovery based on the value of their fixed capital investments.[1]

Because the LECs have no interest in defending either alternative permitted by the Eighth Circuit's judgment, they have devoted their "respondents' briefs" to rearguing the claims that were made or should have been made in their petitioners' brief. In particular, they here argue that the FCC was required to reject TELRIC and to adopt a method in which network element rates are based on the LEC's historical "sunk" costs, either in whole or in substantial part.

There is no merit to the claims that TELRIC violates the statutory requirement that network element rates be "based on the cost of providing the element." The Order's unchallenged findings and the uniform decisions of regulatory and accounting bodies all establish that TELRIC represents the "real," "economic," and "current" costs that the LECs incur in providing their existing network elements.

The LECs' arguments that TELRIC is arbitrary and capricious rest on a series of misstatements of the FCC's

---

[1] In their opposition to the petitions for certiorari (p. 11), BellSouth, SBC, and Verizon ("Bell") contended that the Eighth Circuit said no such things, but Bell's claim was refuted in AT&T's Petitioner's Brief (pp. 37-40), and Bell has now abandoned it.

Order. Their principal contention is that the FCC did not understand that LECs' investments are "sunk" once they are made and that the practice of "anticipatory retardation" means that LECs' networks inherently contain a mix of new, efficient and older, costlier technologies. However, the FCC's Order explicitly acknowledged these facts, and TELRIC requires states to establish the depreciation and rate-of-return components of the rates at levels that reflect the "sunk" character of LEC investments and all the risks of operating under TELRIC and the 1996 Act.

2. The Eighth Circuit's refusal to reinstate the FCC's network element combinations rule was erroneous. The rules reasonably prevent discrimination, and the Eighth Circuit's contrary holding rests on the same interpretation of § 251(c)(3) that this Court has expressly rejected.

I. TELRIC IS AUTHORIZED BY THE STATUTE AND IS MANIFESTLY NOT ARBITRARY.

As was explained in AT&T's prior briefs, TELRIC represents a manifestly permissible method of implementing the 1996 Act. This "bottom-up" method is the most direct, reliable, and administrable method both of identifying the real and economic costs that LECs incur to provide the network elements required to serve today's retail customers and of preventing LECs from illicitly foisting retail costs and costs of serving future customers on their retail competitors. At the same time, because the FCC's TELRIC regulations provide that the depreciation and rate-of-return components of the rates are to reflect all the risks of operating under this regime, the FCC's TELRIC regulations unequivocally permit states to set rates that reasonably and fully compensate the LECs.

By contrast, a "top-down" historical-cost method would begin with book costs that regulators have found to be unreliable and inflated and that bear no relationship to today's costs of meeting existing demand. It would further depend on a series of adjustments or arbitrary cost allocations to exclude

phantom or imprudent investments, to exclude retail costs, to exclude facilities built to serve future customers, and to determine costs in areas of different population densities. In practice, this method would almost assuredly produce rates that are wildly in excess of the costs that the LECs incur when they use their local loops and other bottleneck facilities to provide their own competing retail services. The result would be "discrimination" that violates § 252(d)(1)(A)(ii) and a "price squeeze" that would prevent retail competition from developing in the "*un*shared" parts of the network. Cf. *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 429 (1999) (Breyer, J., concurring and dissenting in part).

That is why "total service" long run incremental cost methods like TELRIC have long been used by the FCC, other federal agencies, state commissions, and antitrust courts to determine the maximum prices that incumbent monopolists may charge their retail competitors for access to essential facilities. That is why the European Commission, its member states, and other foreign regulatory bodies have adopted the method. And that is why the state commissions who have been applying TELRIC for the past five years have defended TELRIC's validity in this Court. See NARUC Br. 12-14.

The LECs challenge TELRIC by making a series of claims that are pervaded with rhetoric, but that lack any substance.

1. First, the LECs incongruously rely on the "necessary or impair" standard of § 251(d)(2), which determines the network elements that LECs are required to make available. The LECs note that this Court held that the FCC misinterpreted these terms in their original 1996 Order; they contend that the FCC made the same error in the intervening decision on remand (which is now before the D.C. Circuit), and they suggest, on these bases, that the network elements that the FCC has designated are facilities that CLECs could readily duplicate. Bell Br. 2; Qwest Br. 26-27.

But TELRIC is the standard that applies to pricing the network elements that are properly designated under § 251(d)(2), and there is no dispute that the facilities that have been designated network elements are "generally . . . bottleneck[] monopol[ies]" under any standard. Order, ¶ 702 (JA 395). For example, in the pending D.C. Circuit appeal, the LECs have not challenged the FCC's requirement that they provide access to the ordinary copper local loops that AT&T now leases and combines with its own switching and other facilities to offer local service to business customers. AT&T Pet. Br. 14-15. This local-services competition is tenuous at best, and it would end if the rates for these bottleneck facilities exceeded the economic costs that LECs incur when they use the same facilities in their competing retail services.

2. AT&T has previously refuted the claims that the FCC violated the statutory requirement of § 252(d)(1)(A)(i) by requiring that network element rates be "based on the use of the most efficient telecommunications technology currently available." 47 C.F.R. § 51.505(b)(1). The LECs are simply wrong that § 252(d)(1)(A) requires that cost determinations be based on the specific costs of the LEC and its network. See AT&T Pet. Br. 36-37. Further, even if the Act imposed this requirement, TELRIC measures the "actual costs" that each LEC incurs in providing its existing facilities. *Id.* at 28-34.

Long run incremental cost is a well-accepted method of determining the costs of individual firms. Yet all long run incremental cost methods can be characterized as making determinations based on a "hypothetical carrier" and an "ideally efficient" network that does not exist. Compare Bell Br. 16; Qwest Br. 2-3. Long run incremental cost methods inherently assume "a wholly new . . . plant." D. Watson & M. Holman, *Price Theory And Its Uses* 195 (4th ed. 1977). As the European Commission explained, the long run "is the time horizon in which the firm could adjust (downwards or

upwards) all of its inputs, including the size of each and any of its production plant, to meet a decrement or increment in the volume of production." Commission of the European Communities, *Commission Recommendation on Interconnection in a Liberalised Telecommunications Market* § 3.3, 1997 C(97)3148 ("*European Commission Report*"). *Accord* Order, ¶ 677 & n.1682 (JA 378) (citing W. Baumol, *Economic Theory and Operations Analysis* 290 (4th ed. 1977)). Any long run incremental cost method further assumes that a firm will select "that plant which produces its output at the lowest possible cost." Baumol, *supra*, at 291. Thus, when state commissions and the FCC used long run incremental cost methods to set maximum prices for access to essential LEC facilities before the 1996 Act was passed, they made their determinations based on "the least-cost, most efficient technology that is currently available for purchase."[2] Foreign regulators apply this same standard.[3]

Contrary to Bell's claims, the "current cost" of using the entity's existing plant and equipment is a function of its efficient replacement cost, not the price that was paid for the equipment up to "30 years" ago. Compare Bell Br. 5. The past expenditures are "sunk," "unavoidable" and irrelevant to the cost of using equipment today. The cost of using equipment today is a function of the facts that today's use causes it to wear out faster and to have to be replaced sooner. Replacement cost measures the value of the equipment, and replacement cost therefore is the basis for measuring the

---

[2] *A Methodology To Determine Long Run Incremental Cost*, 156 P.U.R.4th 1, Ex. A at 13 (Mich. Pub. Serv. Comm'n 1994); *see* AT&T Pet. Br. 11-12.

[3] AT&T Pet. Br. 21; *see also* Australian Competition & Consumer Comm'n, *Access Pricing Principles – Telecommunications* 23 (1997) ("the most efficient technology that is commercially available"); Infocomm Dev. Auth. of Singapore, *Appendix 1: Interconnection/Access In A Fully Liberalized And Developed Convergent Environment, in Second Consultation June-30th*, ¶¶ 5.1.1, 5.1.2.3 (2000).

"real" and "economic" cost of the use of the equipment. See AT&T Pet. Br. 19-21 & 30-31; S. Breyer, *Regulation and Its Reform* 38 (1982).

As the European Commission has stated, once an investment is made, the firm "can either sell the asset to the highest bidder or it can use the asset to produce a good or service which the firm sells to generate an income." *European Commission Report* § 3.3. The cost of using the asset is the opportunity cost of using it rather than selling it at its value. It is determined by the prices of the most efficient substitutes that are commercially available.[4] W. Baumol & J. Sidak, *Toward Competition In Local Telephony* 60 (1994). Thus, in addition to the decisions of the European Commission and other regulatory bodies cited in AT&T's Petitioner's brief (19-21), accounting standards provide that "[t]he current cost of property, plant, and equipment owned by an enterprise is the current cost of acquiring the same service potential ... as embodied by the asset owned," not what was paid for it years ago. 1 Financial Accounting Standards Bd., *FAS No. 89: Financial Reporting and Current Prices, in Original Pronouncements: Accounting Standards as of June 1999*, at 919, ¶ 18 (1999).

The LECs also attempt to dispute that the decisions of other bodies confirm that TELRIC represents the economic costs that monopolies incur in providing essential facilities. Qwest asserts that the prior antitrust, FCC and state decisions cited in AT&T's Petitioner's Brief only set a "price *floor*" of short run or long run incremental cost for a monopolists' retail services. Qwest Br. 36. That is false. The decisions also set a price ceiling for the essential inputs that are provided to competitors of total service long run incremental cost plus a

---

[4] Bell's claim (Br. 19) that there is no "market" for telephone networks is irrelevant and erroneous. There is a market to supply the facilities used in providing network services, and it is the prices of the most efficient technologies currently available that determine replacement costs.

markup for joint and common costs: *i.e.*, TELRIC. AT&T Pet. Br. 11-12.

Similarly, both the European Commission and Oftel (the FCC's British counterpart) expressly adopted the same total service long run incremental cost standard to govern the pricing of network elements provided by their incumbent LECs.[5] In suggesting otherwise, Bell (Br. 35) relies on the irrelevancy that the European Commission and Oftel authorized the use of alternative measures during the interim period before long run incremental cost studies could be developed and refined. The FCC's Order did the same thing. Order, ¶¶ 787-827 (JA 894-914).

There also is no substance to Bell's claim (Br. 34-35) that there are critical differences between TELRIC and the efficient replacement cost methodology that the ICC has used to set maximum railroad rates for captive shippers. Contrary to Bell's mistatement (*id.* at 34), the ICC method does not assume a railroad built to serve only "one shipper" or group of shippers "on a particular route" and thus does not deny shippers the economies existing between that route and the rest of the railroad. To the contrary, like TELRIC, the ICC's method was developed for the express purpose of "taking advantage of economies of density" and allows rates to be set based on the replacement cost of the entire railroad or any hypothetical routes that enjoy economies of scale, scope or density. *Coal Rate Guidelines*, 1 I.C.C.2d 520, 542-43 & 547 n.75 (1985), *aff'd*, 812 F.2d 1444 (3d Cir. 1987).

---

[5] *European Commission Report*, §§ 3.3, 3.5; Oftel, *Access to Bandwidth: Indicative Prices and Pricing Principles*, ¶¶ 3, 9 (2000). Bell's Brief misrepresents Oftel's more recent order. Because LRIC cost models had not been finalized for a single element (the local loops), Oftel there decided to set interim rates by using the results of the incumbent's "'top down'" cost model as a "starting point," and using the results from the most recent proposed long run incremental cost model "to ensure that only relevant costs are included within the calculation." *Id.*

3. The LECs' remaining arguments are that the adoption of TELRIC was arbitrary and capricious. Their basic contention is that the FCC's TELRIC method is suitable only for markets like "pork bellies" and other commodities. Bell Br. 28. They contend that the method is wholly inappropriate in capital-intensive businesses like telecommunications in which equipment has useful lives of up to 30 years, in which facility investments are thus "sunk" once they are made, and in which technology costs are rapidly declining (at least in some segments). They assert that the FCC overlooked these obvious facts about the industry in concluding that TELRIC reasonably "mimics" the prices that would prevail in competitive markets. These claims are refuted by the face of the FCC's Order.

a. The LECs' primary claim is that the FCC's Order rests on the false premise that LECs' networks should always be comprised exclusively of the most efficient technology and that the LECs should adopt the "suicidal business plan" of constantly "tearing down its existing network and building a new one from scratch." Bell Br. 17-18, 21, 25-27; see Qwest Br. 13, 29-31. As the LECs correctly state, no carrier rationally would or should replace functional "sunk" equipment merely because more efficient technology becomes available. Rather, carriers practice "'anticipatory retardation'" in which they delay investment in new and more efficient technology until such time as the relative advantages that the new equipment offers are sufficiently great that it is clear that the carrier can earn the anticipated return and depreciation over the life of the new plant. 1 A. Kahn, *The Economics of Regulation* 119 n.91 (1988).

The LECs' claim is a strawman. Making efficient investment decisions and the costing and valuation of assets are entirely separate matters. See C. Horngren, *Cost Accounting: A Managerial Emphasis*, 378-79, 396-400 (10th ed. 2000); 1 A. Kahn, *The Economics Of Regulation*, 118-19

(1988). TELRIC, in turn, is not a prescription of criteria to govern the LECs' investment decisions. It is a method of valuing the investments that the LECs have made for purposes of setting rates. In turn, TELRIC's valuation of the LECs' facilities is one of inputs that is used to determine two of the components of the LECs' "economic" costs of providing network elements: the annual depreciation allowance and the return on the LECs' investment.

In adopting TELRIC, the FCC acknowledged the very characteristics of telecommunications and other capital-intensive industries that the LECs accuse the FCC of ignoring. The FCC expressly noted that local exchanges are capital-intensive businesses characterized by "significant sunk investment [and] declining technology costs." Order, ¶ 686 (JA 384). In this regard, the FCC was relying on the testimony of Professor Baumol and the others who had acknowledged "these principles" and demonstrated that TSLRIC represents the stream of revenues that provide full compensation to firms in capital-intensive industries, be they competitive industries like semiconductors or monopolies like local telephone networks. Compare AT&T Reply Comments (May 30, 1996), W. Baumol et al. Reply Aff. at 2 (JA 141-42), with Bell Br. 29-30 n.28. The FCC found that the depreciation and cost of capital components of TELRIC fully account all the risks and costs that LECs "incur" due to the combination of significant "sunk investments, declining technology costs, and competitive entry." Order, ¶ 686 (JA 384); see also *id.* ¶¶ 687-689 & 702-703 (JA 385-86 & 395-96). In short, the FCC expressly considered and specifically rejected, the LECs' claims, holding that, "even in the presence of [the LECs'] sunk costs, TELRIC-based prices are an appropriate pricing methodology." *Id.* ¶ 703 (JA 396).

Indeed, although the LECs' briefs are filled with selective quotations of statements by their economic experts, these economists admitted in their testimony before the FCC that

TELRIC will result in fully appropriate network element prices if depreciation and cost of capital calculations reflect all the risks of operating under this regime. See AT&T Pet. Br. 16-17 (citing testimony of Kahn, Tardiff & Hausman); *accord* 1 A. Kahn, *The Economics of Regulation*, 121-22 (1988). The LECs ultimately concede this point. Bell Br. 29. However, the LECs contend that the FCC rules for calculating the depreciation and rate of return components of network element rates are inadequate and are incapable of being implemented by state commissions in a manner that reasonably compensates LECs for the economic costs of providing network elements. These claims, too, rest on misstatements of the FCC's Order.

b. Depreciation determines the percentage of the value of an asset that a LEC is allowed to recover in its rates in any one year. The depreciation component of a network element rate is a product both of the valuation of the asset (here replacement cost) and the state-determined rate of depreciation during the period in which the network element rate remains in effect. For example, if an asset is valued at $100 and the depreciation rate is 20%, the annual depreciation that will be included in the rate is $20. Obviously, a higher depreciation rate can entirely offset the consequences of a lower valuation of a network facility. Thus, even if it were the case that replacement costs for all network elements were constantly declining – as it is not – the LECs are simply wrong in asserting that states cannot establish depreciation allowances that provide LECs with adequate depreciation and capital recovery under TELRIC. See Bell Br. 4.

The LECs' contrary arguments appear to rest on the false premise that TELRIC requires states to set depreciation rates that reflect only the wear and tear on the asset which limits its physical useful life but that ignore the reductions in the value due to declining technology costs. That is incorrect. TELRIC requires that states use "economic depreciation rates" in setting network element rates. 47 C.F.R. § 51.505(b)(3). The

FCC made it explicit that the depreciation components of the rates must reflect not just wear and tear and the asset's physical life, but also "the true changes in economic value of an asset" (Order, ¶ 703 (JA 396)) and the "expected declines in the value of capital goods." *Id.* ¶ 686 (JA 384).

Thus, the FCC's regulations permit (and require) states to establish depreciation rates that compensate LECs for the expected loss in economic value of their network elements. For example, if a switch that cost $100 today had a useful physical life of 10 years and if the replacement cost is declining by 10% a year, it would violate TELRIC if states set depreciation at 10% of the replacement cost each year over ten years. Cf. Bell Br. 4. That would result in depreciation that totalled $65.10 over the life of the switch (*i.e.* $10 in depreciation the first year, $9 the second, $8.10 the third, etc.). TELRIC would here require the state to select an accelerated or other method in which the switch were depreciated over a period of less than ten years.[6] The LECs can then receive annual depreciation allowances that total $100 over the economic life of the switch.

Bell (*id.* at 33 n.25) and Qwest (Br. 35-36) erroneously assert that the Act or the FCC's rules requires states to recalculate TELRIC rates continuously or annually. Indeed, the almost uniform state practice (which the LECs defend) is to establish rates that remain in effect for a period of three years or longer. However, if appropriate depreciation calculations are made under TELRIC, LECs will be protected

---

[6] For example, an accelerated depreciation method might provide for depreciation of $20 the first year, $19 the second, $18.10 the third, *etc.* – and total $100 over a period of approximately 5.5 years. Alternatively, a straight-line method might allow depreciation of $14.30 per year over a period of about seven years, again totaling $100.

against expected declines in the loss of value of their assets under any scenario.[7]

The LECs misstate the FCC's Order in other ways. They claim that FCC has required states to set network element rates based on the depreciation rates that the FCC uses in regulating LECs' interstate exchange access services – unless the LECs prove that they currently face facilities-based competition in the provision of network elements. Bell Br. 32-33. This is simply false. The FCC's rules unconditionally require the use of economic depreciation that takes into account expected changes in technology costs, irrespective of whether there are any alternatives to the LEC's network elements. The FCC's Order states (¶¶ 687-688, 702-703 (JA 385-86, 395-96)) that the likelihood that alternatives will be developed to LEC network elements is a consideration in making the separate rate of return and cost of capital determinations (where that fact is relevant), *not* in the calculation of depreciation rates (where it is irrelevant).

Further, to the extent that the Order requires states to use the FCC's prescribed depreciation rates if no other alternatives are presented, the FCC plainly acted entirely reasonably. Contrary to the LEC's suggestion, the FCC depreciation rates have been set to reflect the expected declines in asset values, and the FCC has found that these rates reflect all the risks that LECs face and that LECs have substantial depreciation reserve surpluses. AT&T's Resp. Br.

---

[7] Bell now contends (Br. 4 n.4) that it would incur losses if there were an "unexpected[]" 20% drop in the replacement cost of a plant (from $100 to $80) after a state set network-element rates in year one and before it recalculated those rates in year two. This argument rests on the implausible assumption that states would not adjust the depreciation rate in the second year, and would readopt the same annual depreciation rate (10%) – such that the allowed depreciation would drop from $10 to $8. Further, even if LECs were to end up bearing the risk of unexpected declines in asset values, they also reap the benefits of unexpected developments that enhance asset values.

27. More fundamentally, the FCC's prescriptions are merely a default rule. The Order (¶ 686 (JA 384-85)) expressly allows parties to "propose" and the states to adopt "specific depreciation rate adjustments that reflect expected asset values over time," and on occasion states have set network element rates based on depreciation lives that are as much as 50% shorter than those assumed by the FCC.[8] Contrary to the LECs' misstatement (Bell Br. 32 n.24), the FCC has upheld the lawfulness of such state measures.[9]

TELRIC's depreciation rules thus reasonably protect LECs against the risks that result from using current replacement costs to value LECs' sunk investments in network element. These risks exist whether or not LECs continue to have monopolies over network elements, and the depreciation rules allows states to provide LECs a return *of* their investments.

c. The cost of capital/rate of return components of rates are designed to provide LECs with a return *on* their investment that is sufficient to reflect all the risks that LECs face in their businesses and to assure that they can continue to attract private capital. See S. Breyer, *Regulation and Its Reform* 40-47 (1982). The FCC fully addressed this interest of LECs. It required that states set TELRIC rates that include "the forward-looking cost of capital." 47 C.F.R. § 51.505(b)(2). The Order acknowledged that "the combination of significant sunk investment, declining technology costs, and competitive

---

[8] *Compare, e.g., Petition for Arbitration*, Nos. TO-97-40 & TO-97-67, slip op. at 110-14 (Mo. Pub. Serv. Comm'n July 31, 1997) (adopting for example a 13.7 year depreciation life for aerial fiber cable), *with Depreciation Requirements for Incumbent Local Exchange Carriers*, 15 FCC Rcd. 242, app. B (1999) (adopting a prescribed depreciation range for aerial fiber cable of 25 to 30 years).

[9] *See, e.g., In-Region InterLATA Servs. in Kan. & Okla.*, No. 00-217, slip op. ¶ 76 (F.C.C. Jan. 22, 2001) (upholding depreciation lives even though they were lower than the FCC's prescribed depreciation lives and pointing out that the FCC has "never stated that states should be precluded from setting depreciation rates that differ from the Commission's").

entry may increase the . . . cost of capital of incumbent LECs" (Order, ¶ 686 (JA 384)), and it required that states set network element rates that include a "cost of capital that appropriately reflects the risks incurred by an investor." *Id.* ¶ 703 (JA 396). There is no merit to any of the LECs' objections to this aspect of the Order.

First, they complain that the FCC mandated that states use the federally prescribed rate of return of 11.25% if the parties to the state proceeding do not propose a higher or lower rate of return. Bell Br. 31-32. But again, this is just a default rule. Moreover, the 11.25% was established in 1990 when interest rates were much higher than today, and states and federal courts that have addressed the LECs' cost of capital in providing network elements have generally determined that 11.25% is too high under current conditions.[10]

Next, Bell claims (*id.* at 30) that the FCC erred by refusing to prescribe a rate of return of 22%-33% and by instead leaving rate of return calculations to state commissions. It notes that LECs presented "evidence" (an affidavit of Dr. Jerry Hausman) that the LECs' cost of capital under TELRIC and the 1996 Act will be "at least two to three times higher than the rate of return authorized in the old monopoly environment," and contends that it was arbitrary for the FCC to refuse to impose Hausman's view on the states.

This claim is baseless. AT&T and MCI each submitted detailed expert affidavits that demonstrated that Hausman's

---

[10] *See, e.g., Bell Atlantic-Virginia, Inc.*, No. PUC970005, 1998 WL 352676, at *3, *8 (Va. State Corp. Comm'n May 22, 1998) (10.12 percent); *Approval of Agreements & Arbitration of Unresolved Issues*, 180 P.U.R.4th 521, 531 (Md. Pub. Serv. Comm'n 1997) (10.1 percent); *Nextlink Pa., Inc.*, 196 P.U.R.4th 172, 210 (Pa. Pub. Util. Comm'n 1999) (9.83%); *Bell Atlantic-Delaware, Inc.* v. *McMahon*, 80 F. Supp. 2d 218, 239-41 (D. Del. 2000) (upholding rate of 10.28%); *Southwestern Bell Tel. Co.* v. *AT&T Communications of the Southwest, Inc.*, No. A 97-C-132-55, 1998 WL 657717, at *13 (W.D. Tex. Aug. 31, 1998) (upholding rate of 10.36 %).

affidavit should be given no weight. They showed that it was based on a misunderstanding of standard cost of capital models, that it made such errors as confusing nominal and real interest rates, and that it rested on unfounded assumptions about the rate of construction of alternative facilities (that have been disproven by the intervening events over the past five years). JA 215-63. Further, based on this testimony, the FCC explained in some detail why it was "not persuaded" by the LECs' "evidence." Order, ¶¶ 686-689 (JA 384-86).

As this Court has held, it does not sit to umpire disputes among economists over ratemaking methodologies.[11] It would be peculiarly inappropriate to do so here, for the FCC's conclusions were well-founded. Beyond that, the FCC has not foreclosed the LECs from making these same claims to state commissions. It merely refused to rely on them to prescribe a rate of return that binds states. *Id.* ¶ 702 (JA 395-96).

The LECs next claim that the FCC arbitrarily prohibited states from deviating from the default (11.25%) cost of capital until "actual competition had in fact materialized." Bell Br. 32. That, too, is wrong. The FCC simply refused to require states to accept the LECs' unsupported assumption of massive and instantaneous entry that strands LEC investment, for the FCC concluded (correctly) that "[t]he more reasonable assumption" is one "of entry occurring over time" that will have little effect on LECs. Order, ¶ 688 (JA 386). Again, moreover, the FCC's Order did not bar LECs from making their contrary claims in the state proceedings.

The LECs also misstates the Order in contending that it prohibits states from adopting network element rates that would protect LECs against "emerging competition [that] threatens to strand investment" by allowing them to

---

[11] *American Commercial Lines, Inc.* v. *Louisville & Nashville R.R.*, 392 U.S. 571, 590 (1968); *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 791-92 (1968).

"*frontload* their recovery of costs." Bell Br. 31-33. As noted, the FCC did not bar states from adopting accelerated depreciation, which would result in rates that are dramatically higher in the early years of an investment. See *supra*.[12]

For these and other reasons, it is spurious for LECs to argue that TELRIC destroys the incentives of competitive local exchange carriers ("CLECs") to invest in facilities. Qwest Br. 21; Bell Br. 24, 29. The risk that CLECs will do so is reflected in the TELRIC-based rates that they must pay for network elements. Further, to foreclose any claim that TELRIC "may discourage facilities-based competition," the FCC required that TELRIC calculations be based not on the most efficient network design, but on LECs' existing wire centers. Order, ¶¶ 683, 685 (JA 382-84). Moreover, because of the enormous transaction costs that CLECs incur in using network service elements, they will have incentives to invest in alternative facilities whenever that is remotely feasible. These points are all confirmed by AT&T's massive investments to construct facilities that it could obtain as network elements.

d. The LECs also argue that the FCC's Order rests on the premise that prices will "instantly" drop because of the "mere availability of a new technology, whether in a lab or in the channels of commerce." Qwest Br. 30. In this regard, they rely on the fact that Professor Baumol has since stated that *if* TELRIC so assumed, "minor readjustment[s]" may be required. W. Baumol & T. Merrill, *Does The Constitution Require That We Kill The Competitive Goose?*, 73 N.Y.U. L. Rev. 1122, 1147 (1998). But the FCC's Order makes no such assumption. TELRIC requires that rates be based on the most efficient technology proven to be "operationally feasible and currently available." Order, ¶ 683 (JA 383). Further, there is

---

[12] The LECs also erroneously argue that the FCC unlawfully refused to allow them to charge "above-cost" rates to foster "innovation." Qwest Br. 35. Section 252(d)(1)(A) squarely prohibits above-cost rates.

nothing "instantaneous" about the implementation of TELRIC. Because of the period of time required to collect data, to prepare and decide a rate case, and to implement the resulting interconnection agreement, a period of several years generally passes between the commercial installation of efficient new technology in LEC networks and the availability of network elements at the rates that reflect the existence of the technology.

4. Against this background, there is no basis for the LECs' assertions that the FCC here attempted to divine the prices that would prevail if telecommunications service were a perfectly competitive market and to "short circuit" the competitive process by imposing these rates by "regulatory *diktat*." Bell Br. 24; Qwest Br. 21, 22. The FCC was addressing rates for facilities found to have substantial "bottleneck" characteristics in today's telecommunications market. These rates are based on "actual prices" that prevail in today's *monopoly* market when LECs install new network elements or replace existing ones using efficient technology (*i.e.*, the best practices of today's monopolists). The rates are to further rest on depreciation and rate-of-return calculations that reflect the LECs' risks in operating under TELRIC in today's conditions. The FCC did not (and could not) even attempt to divine what the prices would be in a market in which multiple firms could economically provide loops, switches and other network elements and in which their innovation in developing, providing, and provisioning the underlying equipment would surely lead to dramatic reductions in their costs and dramatic improvements in their efficiency and capabilities.

By making bottleneck facilities available at the "economic costs" that LECs in fact now incur in providing network elements in today's monopoly market, the 1996 Act and the FCC's Order merely created the possibility of innovation and competition in providing those elements of retail telephone services that do not have natural monopoly characteristics and

that Justice Breyer referred to as the "unshared" segments of telecommunications. Allowing *this* competition institutes a process that will drive retail prices closer to cost. In this regard, it is ironic that Qwest (Br. 21 n.11) relies on the FCC's decision not to prescribe cost-based exchange access charges. There, the FCC expressly relied on the fact that competitors who rely on network elements leased at TELRIC-based rates will drive access charges closer to competitive levels. The LECs' citations thus refute their accusations.

5. Finally, the alternatives to TELRIC that the LECs identify are all historical-cost methods that the FCC properly rejected for the reasons stated in the respondents' briefs of AT&T, the FCC, NARUC and WorldCom. First, that is the case with Qwest's purported "actual forward-looking costs." Qwest would set rates based on the sum of (1) the LECs' incremental costs over an "intermediate horizon," and (2) a return of and on its "fixed" investments in "any existing facilities that would remain in place during that time period." Qwest Br. 39. But as the FCC correctly held (Order, ¶ 686 (JA 384-85)), this is an improper historical-cost method. It allows recovery for "fixed costs on the old equipment – the depreciation that may not yet have been fully recovered, the return on the net investment not fully written off, interest on the debt already incurred." 1 A. Kahn, *The Economics of Regulation* 118 (1988).

For this reason, the FCC also properly rejected the so-called efficient component pricing method. Under it, rates for network elements would be set by taking the LECs' existing retail revenues and subtracting the LECs' incremental costs of supplying the retail and other inputs that its competitors will supply. But this method can result in efficient-component prices only if the retail revenues are capped by TSLRIC and are cost-based. W. Baumol & J. Sidak, *Toward Competition In Local Telephony* 108 (1994). As the FCC found, the LECs' "existing retail rates . . . are not cost based" and this method is thus "improper." Order, ¶¶ 708-711 (JA 401-03).

Qwest also mentions a "price cap" method – which no party advocated below. It would use historical costs to set initial network element rates and make annual adjustments to reflect increases in productivity. The FCC has also found that such methods do not result in cost-based rates. *Rates for Dominant Carriers*, 2 FCC Rcd. 5208, 5211-12 (¶ 22) (1987). Thus, price caps would violate the statute.

II. THE NETWORK ELEMENT COMBINATIONS RULES ARE VALID.

As AT&T's Petitioner' Brief demonstrated (40-46), the Eighth Circuit's refusal to reinstate Rules 315(c)-(f) rests on its conclusion that the "plain language" of the second sentence of Section 251(c)(3) prohibits the FCC from requiring combination of elements. This holding cannot be reconciled with this Court's holdings that (1) the second sentence is "ambiguous" and "does not say, or even remotely imply, that elements *must* be provided only in [discrete pieces] and never in combined form," and (2) "rational" network element combination rules that implement the "nondiscrimination requirement" imposed by Section 251(c)(3)'s first sentence are therefore lawful. *Iowa Utils. Bd.*, 525 U.S. at 394-95 (emphasis in original).

The LECs' arguments here are likewise at war with these holdings.[13] For example, the LECs' contention that Section 251(c)(3)'s second sentence "cannot [be] read . . . as *authorizing*" Rules 315(c)-(f) (Bell Br. 48 (emphasis in original)), attacks a strawman. As the Court found when it upheld Rule 315(b), these rules are authorized by the first sentence of Section 251(c)(3), not the second. The second

---

[13] The LECs reiterate, virtually verbatim, the contention they made in opposing certiorari that this issue has been "abandoned." Bell Br. 41-43. That contention was "necessarily considered and rejected" when certiorari was granted, *United States* v. *Williams*, 504 U.S. 36, 40 (1992), and is no longer properly before the Court. It is also meritless for the reasons stated in AT&T's Reply Brief in support of its petition for certiorari (pp. 8-9).

3. Rate Structure Rules

a. General Rate Structure Rules

(1) Background

741. In addition to applying our economic pricing methodology to determine the rate level of a specific element or interconnection, the state must also determine the appropriate rate structure. We discuss in this section general principles for analyzing rate structure questions, such as in what circumstances charges should be flat-rated or usage sensitive and in what circumstances they should be recurring or non-recurring. These rate structure rules will apply as well if a state sets rates based on default proxies discussed in Section VII.C.2 below, where we also discuss the appropriate rate structure for specific network elements. Network providers incur costs in providing two broad categories of facilities, dedicated and shared. Dedicated facilities are those that are used by a single party -- either an end user or an interconnecting network. Shared facilities are those used by multiple parties. In the NPRM, we proposed that costs should be recovered in a manner that reflects the way they are incurred.[1762] We also sought comment on whether we should require states to provide for recovery of dedicated facility costs on a flat-rated basis, or at a minimum, require LECs to offer a flat-rate option.[1763]

(2) Comments

742. Parties from all sectors of the telecommunications industry agree that costs should be recovered in a manner that reflects the way they are incurred.[1764] Lincoln states that using an approach that varies with capacity, without taking into account the utilization of shared facilities, would not allow small and mid-sized LECs to recover their total costs, because they lack economies of scale and scope.[1765] No commenters take issue with that principle or the principle that the costs of dedicated facilities should be recovered through flat rates. A wide variety of

---

[1762] NPRM at para. 150.

[1763] *Id.* at para. 152.

[1764] *See, e.g.*, AT&T comments at 67; GSA/DoD comments at 10; Kentucky Commission comments at 5; Lincoln Tel. comments at 17; Sprint comments at 62; Texas Public Utility Counsel comments at 36; USTA comments at 57; LDDS comments at 57; NEXTLINK comments at 30 (generally supporting rate structures that reflect off-peak costs); Washington Commission comments at 24.

[1765] Lincoln Tel. comments at 17.

parties proposed that the Commission adopt such a rule.[1766] BellSouth, however, opposes rigid rate structure rules, and contends they could be detrimental if they preclude alternative structures to which parties are willing to agree.[1767]

(3) Discussion

743. We conclude, as a general rule, that incumbent LECs' rates for interconnection and unbundled elements must recover costs in a manner that reflects the way they are incurred. This will conform to the 1996 Act's requirement that rates be cost-based, ensure requesting carriers have the right incentives to construct and use public network facilities efficiently, and prevent incumbent LECs from inefficiently raising costs in order to deter entry. We note that this conclusion should facilitate competition on a reasonable and efficient basis by all firms in the industry by establishing prices for interconnection and unbundled elements based on costs similar to those incurred by the incumbents, which may be expected to reduce the regulatory burdens and economic impact of our decision for many parties, including both small entities seeking to enter the local exchange markets and small incumbent LECs.[1768] We also adopt some more specific rules that follow from this general rule.

744. First, we require that the charges for dedicated facilities be flat-rated, including, but not limited to, charges for unbundled loops, dedicated transport, interconnection, and collocation. These charges should be assessed for fixed periods, such as a month. We are requiring flat-rated charges for dedicated facilities. Usage-based charges for dedicated facilities would give purchasers of access to network elements an uneconomic incentive to reduce their traffic volumes. Moreover, purchasers of access to network elements with low volumes of traffic would pay below-cost prices, and therefore have an incentive to add lines that they would not add if they had to pay the full cost. As stated in the NPRM, a flat-rated charge is most efficient for dedicated facilities, because it ensures that a customer will pay the full cost of the facility, and no more. It ensures that an entrant will, for example, purchase the exclusive right to use additional loops only if the entrant believes that the benefits of the additional loops will exceed its costs. It also ensures that the entrant will not face an additional (and non-cost-based) usage charge.

745. Second, if we apply our general rule that costs should be recovered in a manner that reflects the way they are incurred, then recurring costs must be recovered through recurring charges, rather than through a nonrecurring charge. A recurring cost is one incurred periodically

---

[1766] *See, e.g.*, Florida Commission comments at 31; GSA/DoD comments at 10; MFS comments at 61-63; Ohio Consumers' Counsel comments at 30; Telecommunications Resellers Ass'n comments at 42.

[1767] BellSouth comments at 57-58.

[1768] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

over time. A LEC may not recover recurring costs such as income taxes, maintenance expenses, and administrative expenses through a nonrecurring charge because these are costs that are incurred in connection with the asset over time. For example, we determine that maintenance expenses relating to the local loop must be recovered through the recurring loop charge, rather than through a nonrecurring charge imposed upon the entrant.

746. We find that recovering a recurring cost through a nonrecurring charge would be unjust and unreasonable because it is unlikely that incumbent LECs will be able to calculate properly the present value of recurring costs. To calculate properly the present value of recurring costs, an incumbent LEC would have to project accurately the duration, level, and frequency of the recurring costs and estimate properly its overall cost of capital. We find that, in practice, the present value of the recurring costs cannot be calculated with sufficient accuracy to warrant up-front recovery of these costs because incumbent LECs lack sufficient experience with the provision of interconnection and unbundled rate elements. Without sufficient experience, incumbent LECs are unable to project the length of time that an average entrant would interconnect with, or take an unbundled element from, the incumbent LEC, or how expenses associated with interconnection and unbundled rate elements would change over time. In contrast, a recurring charge for a recurring cost would ensure that a customer is only charged for the costs the entrant incurs while that entrant is taking interconnection service or unbundled rate elements from the incumbent LEC. Moreover, when costs associated with the interconnection and particular unbundled rate elements change, the incumbent LEC can make appropriate adjustments to the charges at the time such cost changes occur.

747. Accordingly, we find that imposing nonrecurring charges for recurring costs could pose a barrier to entry because these charges may be excessive, reflecting costs that may (1) not actually occur; (2) be incurred later than predicted; (3) not be incurred for as long as predicted; (4) be incurred at a level that is lower than predicted; (5) be incurred less frequently than predicted; and (6) be discounted to the present using a cost of capital that is too low.

748. Notwithstanding the foregoing, where recurring costs are *de minimis*, we will permit incumbent LECs to recover such costs through nonrecurring charges. We find that recurring costs are *de minimis* where the costs of administering the recurring charge would be excessive in relation to the amount of the recurring costs.

749. Third, states may, but need not, require incumbent LECs in an arbitrated agreement to recover nonrecurring costs, costs that are incurred only once, through recurring charges over a reasonable period of time. The recovery of such nonrecurring costs through recurring charges is a common practice for telecommunications services. Construction of an interconnector's physical collocation cage is an example of a nonrecurring cost. We find that states may, where reasonable, require an incumbent LEC to recover construction costs for an interconnector's physical collocation cage as a recurring charge over a reasonable period of time in lieu of a nonrecurring charge. This arrangement would decrease the size of the entrant's initial capital

outlay, thereby reducing financial barriers to entry. At the same time, any such reasonable arrangement would ensure that incumbent LECs are fully compensated for their nonrecurring costs.

750. We require, however, that state commissions take steps to ensure that incumbent LECs do not recover nonrecurring costs twice and that nonrecurring charges are imposed equitably among entrants. A state commission may, for example, decide to permit incumbent LECs to charge the initial entrants the full amount of costs incurred for shared facilities for physical collocation service, even if future entrants may benefit. A state commission may, however, require subsequent entrants, who take physical collocation service in the same central office and receive benefits as a result of costs for shared facilities, to pay the incumbent LEC for their proportionate share of those costs, less depreciation (if an asset is involved). Under this approach, the state commission could require the incumbent LEC to provide the initial entrants *pro rata* refunds, reflecting the full amount of the charges collected from the subsequent entrants. Alternatively, a state commission may decide to permit incumbent LECs to charge initial entrants a proportionate fraction of the costs incurred, based on a reasonable estimate of the total demand by entrants for the particular interconnection service or unbundled rate elements.

751. In addition, state commissions must ensure that nonrecurring charges imposed by incumbent LECs are equitably allocated among entrants where such charges are imposed on one entrant for the use of an asset and another entrant uses the asset after the first entrant abandons the asset. For example, when an entrant pays a nonrecurring charge for construction of a physical collocation cage and the entrant discontinues occupying the cage before the end of the economic life of the cage, a state commission could require that the initial entrant receive a *pro rata* refund from the incumbent LEC for the undepreciated value of the cage in the event that a subsequent entrant takes physical collocation service and uses the asset. Under this approach, the state commission could require that the subsequent entrant pay the incumbent LEC a nonrecurring charge equal to the remaining unamortized value of the cage and the initial entrant will receive a credit from the incumbent LEC equal to the unamortized value of the cage at the time the subsequent entrant takes service and utilizes the cage.

752. BellSouth's concern that rate structure rules could preclude mutually agreeable alternative structures is misplaced. The rate structure rules we adopt here apply only to rates imposed by the states in arbitration among the parties and to state review of BOC statements of generally available terms. Our rules do not restrict parties from agreeing to alternative rate structures. On the contrary, our intent, following the clear pro-negotiation spirit of the 1996 Act, is for parties to use the backdrop of state arbitrations conducted under our rules, to negotiate more efficient, mutually agreeable arrangements, subject, of course, to the antitrust laws[1769] and to the 1996 Act's requirements that voluntarily negotiated agreements not unreasonably discriminate

[1769] Sherman Antitrust Act, 15 U.S.C. §§ 1 *et seq.*

against third parties.[1770]

b. Additional Rate Structure Rules for Shared Facilities

(1) Background

753. In the NPRM, we stated our belief that the costs of shared facilities should be recovered in a manner that efficiently apportions costs among users that share the facility. The NPRM noted that, for shared facilities, it may be efficient to set prices using any of the following: a usage-sensitive charge; a usage-sensitive charge for peak-time usage and a lower charge for off-peak usage; or a flat charge for the peak capacity that an interconnector wishes to pay for and use as though that portion of the facility were dedicated to the interconnector.[1771]

(2) Comments

754. USTA argues that shared facilities are more reasonably priced on a usage-sensitive basis.[1772] The Florida Commission and Telecommunications Resellers Association both contend that a variety of charges may be appropriate for shared facilities.[1773] Telecommunications Resellers Association further argues that the Commission should "require, where practicable, that LECs offer a flat-rated option with respect to common facilities and bear the burden of justifying instances in which they allege that such an option is not workable."[1774] AT&T makes a similar proposal, arguing that rates should generally be non-usage sensitive except where a usage-based charge is clearly required.[1775] Lincoln Tel. argues that costs of shared facilities should be apportioned among users of the shared facility and that a capacity approach that does not account for utilization of shared facilities would prevent small and mid-sized LECs from recovering their costs as they lack economies of scale.[1776]

[1770] *E.g.*, 47 U.S.C. § 252(e)(2)(A)(i).

[1771] NPRM at para. 151.

[1772] USTA comments at 57; *see also* Lincoln Tel. comments at 17; Sprint comments at 62; NTIA reply at 33-34.

[1773] Florida Commission comments at 31; Telecommunications Resellers Ass'n comments at 42.

[1774] Telecommunications Resellers Ass'n comments at 42.

[1775] AT&T comments at 67.

[1776] *See* Lincoln Tel. comments at 17.

(3) Discussion

755. The costs of shared facilities including, but not limited to, much of local switching, tandem switching, transmission facilities between the end office and the tandem switch, and signaling, should be recovered in a manner that efficiently apportions costs among users. Because the cost of capacity is determined by the volume of traffic that the facilities are able to handle during peak load periods, we believe, as a matter of economic theory, that if usage-sensitive rates are used, then somewhat higher rates should apply to peak period traffic, with lower rates for non-peak usage. The peak load price would be designed to recover at least the cost of the incremental network capacity added to carry peak period traffic. Pricing traffic during peak periods based on the cost of the incremental capacity needed to handle additional traffic would be economically efficient because additional traffic would be placed on the network if and only if the user or interconnecting network is willing to pay the cost of the incremental network capacity required to handle this additional traffic. Such pricing would ensure that a call made during the peak period generates enough revenue to cover the cost of the facilities expansion it requires, and would thus give carriers an incentive to expand and develop the network efficiently. In contrast, off-peak traffic imposes relatively little additional cost because it does not require any incremental capacity to be added to base plant, and consequently, the price for carrying off-peak traffic should be lower.

756. We recognize, however, that there are practical problems associated with a peak-sensitive pricing system. For example, different parts of a given provider's network may experience peak traffic volumes at different times (*e.g.*, business districts may experience their peak period between 10:00 and 11:00 a.m., while suburban areas may have their peak periods between 7:00 and 8:00 p.m.) Moreover, peak periods may change over time. For instance, growth in Internet usage may create new peak periods in the late evening. Further, charging different prices for calls made during different parts of the day may cause some customers to shift their calling to the less expensive time periods, which could shift the peak or create new peaks. Thus, to design an efficient peak-sensitive pricing system requires detailed knowledge of both the structure of costs as well as demand.

757. We conclude that the practical problems associated with peak-sensitive pricing make it inappropriate for us to require states to impose such a rate structure for unbundled local switching or other shared facilities whose costs vary with capacity. Because we believe that such a structure may be the most economically efficient, however, we do not prohibit states from imposing peak-sensitive pricing. We also expect that parties may be able to negotiate agreements with peak/off-peak differences if the benefits of such distinctions are sufficiently high. We conclude that states may use either usage-sensitive rates or flat capacity-based rates for shared facilities, if a state finds that such rates reasonably reflect the costs imposed by the various users. States may consider for guidance rate structures developed in competitive markets for shared facilities. We note that our decisions in this section may benefit small entity entrants in local exchange and exchange access markets by minimizing the extent to which purchasers of

interconnection and unbundled access pay rates that diverge from the costs of those facilities and services.[1777]

c. Geographic/Class-of-Service Averaging

(1) Background

758. In the NPRM, we asked about the appropriate level of aggregation for rates for interconnection and access to unbundled elements. We noted that geographic averaging is simple to administer and prevents unreasonable or unlawful rate differences but, where averaging covers high and low cost areas, it could distort competitors' decisions whether to lease unbundled elements or build their own facilities. We sought comment on the geographic deaveraging of interconnection and unbundled element rates by zone, LATA, or other area.[1778]

759. We also inquired about disaggregation by class of service. We questioned whether business and residential loops, or loops deployed using different technologies should be charged different rates, and how large a differential should be allowed.[1779]

(2) Comments

760. *Geographic Deaveraging.* Commenters generally agreed that rates for interconnection and unbundled elements should be geographically deaveraged where there are significant cost variations.[1780] Many parties assert that there are large geographic variations in the costs of providing these services and elements.[1781] Many commenters argue that rates for interconnection and unbundled elements must be geographically deaveraged in order to meet the

---

[1777] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

[1778] NPRM at para. 133.

[1779] *Id.*

[1780] *See, e.g.*, Connecticut Commission comments at 13-14; N. Economides comments at 3; Maine Commission, *et al.* comments at 19. *Cf.* Colorado Commission comments at 41; Ohio Consumers' Counsel comments at 27-28 (deaveraging should be left to states); Pennsylvania Commission comments at 31 (noting industry movement towards deaveraging); Texas Commission at 24 (Commission should defer geographic deaveraging and rate rebalancing to universal service proceeding).

[1781] *See, e.g.*, Cincinnati Bell comments at 27; Lincoln Tel. comments at 14; Maine Commission, *et al.* comments at 27-28; Sprint comments at 50-51.

cost-based requirements of sections 251 and 252.[1782] Teleport maintains, however, that most geographic or class-of-service classifications have arisen from marketing or regulatory considerations and have no basis in cost causation.[1783] The Ad Hoc Telecommunications Users Committee fears the "balkanization of [incumbent] LECs' markets" and would only allow geographic deaveraging where incumbent LECs could demonstrate significant regional variation in their non-common costs.[1784] It claims that excessive pricing flexibility would encourage the recovery of common costs to be shifted from competitive markets to less competitive markets.[1785] Finally, MFS would have us require geographic averaging to deter anticompetitive, strategic pricing by incumbent LECs.[1786]

761. *Extent of Deaveraging.* Cincinnati Bell, Lincoln Tel., and MECA would place no limits on the degree of deaveraging that would be permitted.[1787] MCI and Sprint advocate deaveraging based on the population density in specified geographic areas or zones.[1788] AT&T also advocates zone density deaveraging and would have us require at least six zones.[1789] MFS proposes that prices could be averaged over several possible areas, with state-wide averaging being the maximum geographic area. To address concerns that widespread averaging may force low cost areas to subsidize high cost areas, MFS suggests that exchanges be assigned to a small number of cost bands based on access line density, but that rates be set at the state-wide average cost of the exchanges assigned to each zone.[1790] GST generally favors a level of disaggregation that would mitigate incumbent LEC administrative expenses, but would require loop components

[1782] AT&T comments at 60.

[1783] Teleport comments at 48.

[1784] Ad Hoc Telecommunications Users Committee comments at 47.

[1785] *Id.*

[1786] MFS comments at 55-56.

[1787] *See, e.g.*, Cincinnati Bell comments at 27; Lincoln Tel. comments at 14; MECA comments at 46.

[1788] MCI comments at 68; Sprint comments at 50; *see also* MFS comments at 55-57.

[1789] AT&T comments at 67.

[1790] MFS comments at 55-56.

such as drops to be deaveraged and priced at LRIC.[1791]

762. *Opposition to National Rule.* Many state commissions seek flexibility to determine the degree of deaveraging and argue that this issue should be left to the states.[1792] Several favor deaveraging wherever the benefits exceed the administrative costs.[1793] The Connecticut Commission has already allowed SNET to create four cost categories based on density.[1794] The Michigan Commission would deaverage rates for interconnection and access to unbundled elements only where competitive entry warrants such flexibility, subject to a TSLRIC floor constraint.[1795] Michigan Commission further states that there may also be non-competitive situations that warrant rate deaveraging, such as when a service has wide cost variances, when averaging may reduce subscription levels, or when deaveraging could provide more accurate market signals due to cost variation.[1796]

763. *Class-of-Service Deaveraging.* In contrast to the general support by parties for geographic deaveraging, only one party supports class-of-service deaveraging.[1797] That party, the Ohio Consumers' Counsel, argues that permitting intercategory restrictions on unbundled elements would be consistent with intercategory restrictions on resale, such as prohibitions against reselling residential services to business customers, which are permitted under the 1996 Act.[1798] Many parties argue that incumbent LECs should not be able to charge different rates for interconnection or unbundled elements based on the class of service being provided with the elements or the class

---

[1791] GST comments at 30.

[1792] *See, e.g.*, Colorado Commission comments at 41; Connecticut Commission comments at 13-14; Maine Commission, *et al.* comments at 19-21; Michigan Commission comments at 15; Texas Commission comments at 24; *see also* Ohio Consumers' Counsel comments at 27-28; California Commission reply at 18.

[1793] *See, e.g.*, Connecticut Commission comments at 13-14; Indiana Commission comments at 24; Mass. Commission comments at 11 n.5.

[1794] Connecticut Commission comments at 13-14.

[1795] Michigan Commission comments at 15-16.

[1796] *Id.*

[1797] Ohio Consumers' Counsel comments at 27-28.

[1798] *Id.*

of customer purchasing or using the interconnection or unbundled elements.[1799] According to most commenters, the 1996 Act's requirement that rates for interconnection and unbundled elements be cost-based generally precludes class-of-service rate differences, unless the costs of provision vary significantly across classes.[1800] Sprint adds that there is no cost justification for rates to differ when unbundled elements are used for business customers instead of residential customers. Sprint also argues that requiring different rates for newer, less-expensive elements would give entrants the incentive to avoid serving customers connected to older, more-expensive plant, which would leave incumbent LECs at systematic cost disadvantages.[1801]

(3) Discussion

764. *Geographic Deaveraging.* The 1996 Act mandates that rates for interconnection and unbundled elements be "based on the cost . . . of providing the interconnection of network elements." [1802] We agree with most parties that deaveraged rates more closely reflect the actual costs of providing interconnection and unbundled elements. Thus, we conclude that rates for interconnection and unbundled elements must be geographically deaveraged.

765. The record reflects that at least two states have implemented geographically-deaveraged rate zones.[1803] These rate zone pricing systems have generally included a minimum of three zones. In the *Expanded Interconnection* proceeding, the Commission also permitted LECs to implement a three zone structure.[1804] We conclude that three zones are presumptively sufficient to reflect geographic cost differences in setting rates for interconnection and unbundled elements, and that states may, but need not, use these existing density-related rate zones. Where such

---

[1799] *See, e.g.*, Koch comments at 3; GST comments at 30; Mass. Commission comments at 11; MFS comments at 56-57; Sprint comments at 50; Teleport comments at 48.

[1800] *See, e.g.*, Citizens comments at 18; Mass. Commission comments at 11; MFS comments at 56-57.

[1801] Sprint comments at 51.

[1802] 47 U.S.C. § 252(d)(1)(a)(i).

[1803] Connecticut Commission comments at 13; Illinois Commission comments at Attachment C (Illinois Commerce Commission Order), p.54, 60-61.

[1804] *Expanded Interconnection with Local Telephone Company Facilities and Amendment of the Part 69 Allocation of General Support Facility Costs*, CC Docket Nos. 91-141 and 92-222, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369, 7454-57 (1992) (*Expanded Interconnection Order*); Second Report and Order and Third Notice of Proposed Rulemaking, 8 FCC Rcd 7374, 7426-29 (1993). LEC central offices in areas with the highest traffic densities were assigned to Zone 1; offices in areas with intermediate degrees of density were assigned to Zone 2; and offices in areas with the lowest density were assigned to Zone 3.

systems are not in existence, states shall create a minimum of three cost-related rate zones to implement deaveraged rates for interconnection and unbundled elements. A state may establish more than three zones where cost differences in geographic regions are such that it finds that additional zones are needed to adequately reflect the costs of interconnection and access to unbundled elements.

766. *Class-of-Service Deaveraging.* The record leads us to the opposite conclusion for class-of-service deaveraging. Under the 1996 Act, wholesale rates for resold services will be based on retail rates less avoided costs. Rates for interconnection and access to unbundled elements, however, are to be based on costs. We conclude that the pricing standard for interconnection and unbundled elements prohibits deaveraging that is not cost based. Interconnection and unbundled elements are intermediate services provided by incumbent LECs to other telecommunications carriers, and there is no evidence that the cost of providing these intermediate services varies with the class of service the telecommunications carrier is providing to its end-user customers. We conclude that states may not impose class-of-service deaveraging on rates for interconnection and unbundled elements. We disagree with the Ohio Consumers' Counsel's position that the 1996 Act's explicit permission of class-of-service deaveraging of resold services implies that class-of-service deaveraging should be permitted for interconnection and unbundled elements. Finally, we note that these decisions concerning averaging may be expected to lead to increased competition and a more efficient allocation of resources, which should benefit the entire industry, including small entities and small incumbent LECs.[1805]

C. Default Proxy Ceilings and Ranges

767. As previously discussed, we strongly encourage state commissions, as a general rule, to set arbitrated rates for interconnection and access to unbundled network elements pursuant to the forward-looking, economic cost pricing methodology we adopt in this Order. Such rates would approximate levels charged in a competitive market, would be economically efficient, and would be based on the forward-looking, economic cost of providing interconnection and unbundled elements. We recognize, however, that, in some cases, it may not be possible for carriers to prepare, or the state commission to review, economic cost studies within the statutory time frame for arbitration and thus here first address situations in which a state has not approved a cost study. States that do not complete their review of a forward-looking economic cost study within the statutory time periods but must render pricing decisions, will be able to establish interim arbitrated rates based on the proxies we provide in this Order. A proxy approach might provide a faster, administratively simpler, and less costly approach to establishing prices on an interim basis than a detailed forward-looking cost study.

768. The default proxies we establish will, in most cases, serve as presumptive ceilings. States may set prices below those ceilings if the record before them supports a lower price.

[1805] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

States should provide a reasoned basis for selecting a particular default price. In one case, for local switching, the default proxy is a range within which a state may set prices.

769. States that set prices based upon the default proxies must also require the parties to update the prices in the interconnection agreement on a going-forward basis, either after the state conducts or approves an economic study according to the cost-based pricing methodology or pursuant to any revision of the default proxy. We believe generic economic cost models,[1806] in principle, best comport with the preferred economic cost approach described previously, and we intend to examine further such models by the first quarter of 1997 to determine whether any of those models, with any appropriate modifications, could serve as better default proxies. Any updated price would take effect beginning at the time of the completed and approved study or the application of the revised default proxy.

770. Second, if a state has approved or conducted an economic cost study, prior to this Order, that complies with the methodology we adopt in this Order, the state may continue to apply the resulting rate even when not consistent with our default proxies. There must, however, be a factual record, including the cost study, sufficient for purposes of review after notice and opportunity for the affected parties to participate.

771. Finally, while we provide for the use by states of default proxies, we recognize that certain states that are unable to utilize an economic cost study may wish to obtain the benefits of setting rates pursuant to such a study for its residents. The Commission will therefore entertain requests by states to review an economic cost study, to assist the state in conducting or reviewing such a study, or to conduct such a study.

1. Use of Proxies Generally

a. Background

772. In the NPRM, we discussed the possibility of setting certain outside limits for interconnection and unbundled element rates, in particular, by the use of proxies. We invited parties to comment on whether the use of certain proxies to set outer boundaries on the prices for interconnection and unbundled elements would be consistent with the pricing principles of the 1996 Act. Specifically, in the NPRM, we asked parties to comment on the benefits of various types of proxies: (1) generic cost studies, such as the Benchmark Cost Model and the Hatfield models;[1807] (2) some measure of nationally-averaged cost data;[1808] (3) rates in existing

[1806] *See* Section VII.C.3. *infra.*

[1807] NPRM at para. 137; *see infra*, Section VII.C.3, discussing generic cost models.

interconnection and unbundling arrangements between incumbent LECs and other providers of local service, such as neighboring incumbent LECs, CMRS providers, or other entrants in the same service area;[1809] (4) a subset of the incumbent LECs' existing interstate access rates, charged for interconnection with IXCs and other access customers, or an intrastate equivalent;[1810] (5) use of the interstate prices established in the *ONA* proceeding for unbundled features and functions of the local switch as ceilings for the same unbundled elements under section 251;[1811] and (6) any other administratively simple methods for establishing a ceiling for interconnection and unbundled network element rates.[1812] As a counterpart to ceilings, we also sought comment on whether it would be necessary or appropriate for us to establish floors for interconnection and unbundled element prices.[1813]

b. Comments

773. *Proxies Generally.* A number of parties offer general support for the use of cost proxies to establish upper limits on the rates that incumbent LECs may charge for interconnection and unbundled elements.[1814] Ad Hoc Telecommunications Users Committee cautions, however, that using a proxy approach does not eliminate the need for detailed analysis of the cost methodologies and cost inputs upon which the proxy is based.[1815] In addition, USTA contends that the Commission should establish a presumptive framework using targets based on pricing proxies, from which the states would be permitted to depart based on individual circumstances.[1816]

[1808] NPRM at para. 137.

[1809] *Id.* at para. 138.

[1810] *Id.* at paras. 139-140.

[1811] *Id.* at para. 140.

[1812] *Id.* at para. 141.

[1813] *Id.* at para. 143.

[1814] *See, e.g.*, GSA/DoD comments at 8; Cox comments at 31, reply at 30; WinStar comments at 31; NEXTLINK comments at 27-28; Texas Public Utility Counsel Comments at 28-33; NCTA comments at Attachment A (Declaration of Bruce M. Owen), pp.5-6, reply at 18-19; *see also* USTA comments at 50 ("may be a feasible way to establish presumptively valid rates for some unbundled elements").

[1815] Ad Hoc Telecommunications Users Committee comments at 48-49.

[1816] USTA reply at 19, 28; *see also* Washington Commission comments at 27.

774. Incumbent LECs and AT&T generally oppose the use of proxies.[1817] They argue that a national proxy methodology for all network elements is inappropriate because it would not reflect cost-based rates,[1818] may restrict competitive entry,[1819] does not allow for variations among the states,[1820] and is inconsistent with the 1996 Act's mandate of economic costing.[1821] Several commenters contend that the use of proxies could harm small and mid-sized incumbent LECs if such proxies are developed from larger geographic and demographic scales.[1822] In addition, Ameritech opposes the use of proxies for those states that have already adopted cost methodologies and urges the Commission to limit application of such proxies to states that have not yet adopted appropriate cost and pricing methodologies.[1823]

775. *Floors and Ceilings.* Several commenters oppose adoption of a federal floor and ceiling for the rates of interconnection and access to unbundled elements.[1824] They argue generally that such an approach is inferior to a prescription of a specific methodology because it results in rates that are not cost-based and therefore inconsistent with the statute, provides an incentive to incumbent LECs to price inefficiently at the maximum, and removes incentives for

---

[1817] *See, e.g.*, AT&T comments at 52-53; Bell Atlantic comments at 39; Cincinnati Bell comments at 27; Frontier comments at 22-23; LDDS comments at 65 n.66; Lincoln Tel. comments at 15-16.

[1818] *See, e.g.*, ALTS comments at 37; AT&T comments at 53; NYNEX comments at 53; Lincoln Tel. comments at 15-16; Texas Statewide Telephone Cooperative comments at 14; Rural Tel. Coalition comments at 22; Washington Independent Tel. Ass'n comments at 6.

[1819] *E.g.*, Cincinnati Bell comments at 28; AT&T comments at 53.

[1820] *See, e.g.*, Bell Atlantic comments at 39; Rural Tel. Coalition comments at 22; Wyoming Commission comments at 31; Alaska Commission comments at 2-3.

[1821] *See, e.g.*, ALTS comments at 35; Time Warner comments at 54-55; Washington Independent Tel. Ass'n comments at 6-7; Ohio Commission comments at 50.

[1822] *See, e.g.*, Cincinnati Bell comments at 28; Colorado Independent Tel. Ass'n comments at 4; Illinois Ind. Ass'n comments at 5; Lincoln Tel. comments at 17; Matanuska Tel. comments at 4; Rural Tel. Coalition comments at 22, 28-29; SBA comments at 16; TDS comments at 22.

[1823] Ameritech comments at 61.

[1824] *See, e.g.*, Frontier comments at 22; Lincoln Tel. comments at 14-15; MECA comments at 47; Pennsylvania Commission comments at 31; Telecommunications Resellers Ass'n comments at 41.

upgrading network technology.[1825] Moreover, any such price ceiling would have to be set as high as the reasonable price for the highest cost company or be challenged as confiscatory when higher cost LECs are unable to recover their costs.[1826] In addition, the Texas Public Utility Counsel notes that floors impair the ability of competition to reveal how low costs really are.[1827]

776. Many parties agree, however, that if the Commission establishes pricing guidelines it should use an "outer bounds" pricing approach or require pricing within a zone of reasonableness.[1828] Others support an "outer bounds" if the Commission ensures that states will have sufficient leeway to accommodate state-specific situations,[1829] and the range of reasonableness is not so circumscribed as to reduce the range to the equivalent of a price point.[1830] They argue that establishing separate floors and ceilings enables the Commission to set absolute boundaries that frame the debate with the incumbent LEC concerning relevant costs and prices during negotiations and ultimately arbitration, while giving states flexibility to address state-specific costing issues.[1831] Parties assert that calculation of a perfectly correct, single price is impossible and that cost boundaries allow states to choose an acceptable pricing result with a range of reasonable rates.[1832] Several parties agree that the Commission should establish a presumptive rate ceiling, and that rates exceeding the ceiling should be presumed unlawful.[1833] USTA contends that, if the Commission adopts rate ceilings, such ceilings should indicate levels

---

[1825] *See, e.g.*, NYNEX comments at 57; Frontier comments at 22-23; Lincoln Tel. comments at 14-15; AT&T comments at 52-53; TDS comments at 22.

[1826] Oregon Commission comments at 29-30; *see also* GVNW comments at 38-39.

[1827] Texas Public Utility Counsel comments at 33.

[1828] *See, e.g.*, Ad Hoc Telecommunications Users Committee comments at 48; BellSouth comments at 55; Cox comments at 24; GSA/DoD comments at 8; NEXTLINK comments at 27-28; SBC comments at 93; USTA comments at 38; WinStar comments at 31; NCTA reply at 18.

[1829] *See, e.g.*, Kentucky Commission comments at 5; Ohio Consumers' Counsel comments at 29; Puerto Rico Tel. comments at 10-11; Washington Commission comments at 26.

[1830] *See, e.g.*, BellSouth comments at 55.

[1831] *See, e.g.*, GSA/DoD comments at 8; Cox comments at 24, reply at 30-31; NEXTLINK comments at 27-28.

[1832] *See, e.g.*, Rural Tel. Coalition comments at 30.

[1833] *See, e.g.*, ACSI comments at 56; Bell Atlantic comments at 39-40; Cincinnati Bell comments at 27, 30; MCI comments at 60; PacTel comments at 73-74; Texas Public Utility Counsel comments at 28-29.

above which rates must be further justified.[1834] Ameritech maintains that floors should be used only as a benchmark below which rates may not be set in order to guard against cross-subsidization and predatory pricing.[1835]

777. *Generic Cost Models.* Several generic forward-looking cost models were introduced into the record. These are discussed in Section VII.C.3. below.

778. *Nationally-Averaged Costs.* Although a few commenters support the use of nationally-averaged costs as a proxy to establish the rates for interconnection and unbundled network elements,[1836] many more parties oppose the use of such nationally-averaged cost data.[1837] These parties argue that nationally-averaged data ignore geographically divergent factors and the interests of small or rural LECs, do not account for variance of cost between incumbent LECs, and do not reflect the true cost of the service.[1838] No nationally-averaged cost studies were introduced into the record.

779. *Existing Interconnection Agreements.* Generally, commenters oppose the use of rates in existing interconnection agreements as a proxy-based ceiling for interconnection and unbundled element rates.[1839] These parties argue that, because the agreements are the subject of the negotiation between two carriers with their own particular characteristics and needs, such agreements are likely to be inconsistent and not cost-based, may not be based on the pricing standards codified at 252(d), and the services covered by these agreements may not be those that

---

[1834] USTA comments at 50.

[1835] Ameritech comments at 73; *see also* GSA/DoD comments at 8; Ohio Consumers' Counsel comments at 28; TDS comments at 20.

[1836] *See, e.g.*, MECA comments at 47; PacTel comments at 74; Sprint comments at 55; *see also* ACSI comments at 56.

[1837] *See, e.g.*, Ad Hoc Telecommunications Users Committee comments at 49-50; Bay Springs, *et al.* comments at 17; Cincinnati Bell comments at 28; Colorado Independent. Tel. Ass'n comments at 4; Florida Commission comments at 29; Illinois Independent Tel. Ass'n comments at 5-6; Lincoln Tel. comments at 15-16; Telecommunications Resellers Ass'n comments at 41.

[1838] *See, e.g.*, Ad Hoc Telecommunications Users Committee comments at 49; Bay Springs, *et al.* comments at 17; Cincinnati Bell comments at 28; GVNW comments at 31-38.

[1839] *See, e.g.*, ACSI comments at 58; Ad Hoc Telecommunications Users comments at 52; Cincinnati Bell comments at 28-29; Colorado Commission comments at 43; Florida Commission comments at 30; MCI comments at 70; Telecommunications Resellers Ass'n comments at 41.

entrants need to purchase.[1840] A few parties express qualified support for a proxy based on the rates in existing interconnection agreements between incumbent LECs, arguing that such rates have already been scrutinized and determined to be just and reasonable.[1841] WinStar cautions that the Commission should not use the rates contained in the existing interconnection agreements between incumbent LECs and CMRS providers or other new entrants as a proxy ceiling because they were negotiated by parties with unequal bargaining power.[1842]

780. *Interstate Access.* A number of parties support the use of a proxy based on existing interstate access charges, claiming that it is easy to apply, based on cost, and would be self-correcting as the access reform and universal service proceedings remove subsidies from access rates.[1843] ALLTEL further maintains that if access charges are used, there should be no requirement for small and mid-sized LECs to produce cost studies that could hamper their interconnection negotiations.[1844] USTA further argues that such proxies are important to all LECs, but are especially important for rural, small, and mid-sized LECs subject to the two percent waiver process, who should not be subjected to the burden of producing expensive and time-consuming cost studies.[1845] Several parties note that some access charges may need to be adjusted or converted to reflect the characteristics of particular unbundled service offerings.[1846] Others oppose the development of a proxy-based ceiling derived from existing interstate access rates, because access charges are based on historical, rather than economic, costs, and contain

[1840] *See, e.g.*, Ad Hoc Telecommunications Users Committee comments at 52; Florida Commission comments at 30; Telecommunications Resellers Ass'n comments at 41; Time Warner comments at 55.

[1841] *See, e.g.*, Bell Atlantic comments at 39-40; Ohio Consumers' Counsel comments at 28-29; PacTel reply at 34-35; Pennsylvania Commission comments at 31; Texas Commission comments at 24-25; WinStar comments at 32.

[1842] WinStar comments at 34; *see also* Telecommunications Resellers Ass'n comments at 41; ACSI comments at 58.

[1843] *See, e.g.*, ALLTEL comments at 10-11; Bell Atlantic comments at 39-40, 56; BellSouth comments at 56; Cincinnati Bell comments at 29; SBC comments at 94; USTA comments at 54, reply at 28.

[1844] ALLTEL comments at 11.

[1845] USTA reply at 27-28.

[1846] *See, e.g.*, Cincinnati Bell at 30; SBC comments at 95; USTA comments at 54.

inordinate amounts of contribution.[1847] These commenters note that setting rates for other elements that could not be derived from access rates would involve application of different proxies,[1848] and the intrastate and interstate rates associated with common lines are applied in different ways to different categories and classes of customers.[1849] NYNEX argues access charges were designed for a different purpose than interconnection and unbundled elements and therefore would be inappropriate proxies.[1850]

781. In addition, several parties assert that a proxy based on access charges should include all or part of the CCLC or TIC, because otherwise it would be impossible to determine whether an appropriate amount of joint and common costs would be recovered, and IXCs would be able to reconstruct access through unbundled elements priced less than access.[1851] GVNW argues that the TIC is particularly important for small LECs that are not allowed to charge a rate that more accurately reflects their tandem switched transport costs.[1852] On the other hand, several commenters argue that the CCLC and TIC should be excluded,[1853] and WinStar further maintains that, even without those elements, access charge rates would still be too high to serve as a proxy ceiling.[1854]

[1847] *See, e.g.*, ACSI comments at 58; Ad Hoc Telecommunications Users Committee comments at 52-53; Colorado Commission comments at 43; Frontier comments at 23; Lincoln Tel. comments at 15-16; MCI comments at 70; MFS comments at 57 n.66.

[1848] *See, e.g.*, Ad Hoc Telecommunications Users Committee comments at 52-53.

[1849] *See, e.g.*, NYNEX comments at 59-60.

[1850] NYNEX comments at 58-59.

[1851] *See, e.g.*, Cincinnati Bell comments at 29; NYNEX comments at 59; Texas Commission comments at 25; USTA comments at 51-53.

[1852] GVNW comments at 39.

[1853] *See, e.g.*, Sprint comments at 58; Texas Public Utility Counsel comments at 30-32; WinStar comments at 36-37.

[1854] WinStar comments at 36-37.

c. Discussion

782. We adopt, in the section below, default proxies for particular network elements. We believe that these default proxies generally will result in reasonable price ceilings or price ranges and, for administrative and practical reasons, will be beneficial to the states in conducting initial rate arbitrations, especially in the time period prior to completion of a cost study. The proxies we adopt are designed to approximate prices that will enable competitors to enter the local exchange market swiftly and efficiently and will constrain the incumbent LECs' ability to preclude efficient entry by manipulating the allocation of common costs among services and elements. States that utilize the default proxies we establish to set prices in an arbitration should revise those prices on a going-forward basis when they are able to utilize the preferred economic costing methodology we describe in Section VII.B.2.a. above, or if we subsequently adopt new proxies.[1855]

783. We have considered the economic impact of the adoption of default proxy ceilings and ranges on small entities, including new entrants and small incumbent LECs.[1856] The adoption of proxies for interim arbitrated rates should minimize regulatory burdens on the parties to arbitration, including small entities seeking to enter the local exchange markets and small incumbent LECs, by permitting states to implement the 1996 Act more quickly and facilitating competition on a reasonable and efficient basis by all firms in the industry. We therefore believe that the adoption of default proxy ranges and ceilings advances the pro-competitive goals of the 1996 Act. We also note that certain small incumbent LECs are not subject to our rules under section 251(f)(1) of the 1996 Act, unless otherwise determined by a state commission, and certain other small incumbent LECs may seek relief from their state commissions from our rules under section 251(f)(2) of the 1996 Act.[1857]

784. The proxies that we establish represent the price ceiling or price ranges for the particular element on an averaged basis. In Section VII.B.3.c. above, we required that rates be set on a geographically-deaveraged basis. Consequently, states utilizing the proxies shall set rates such that the average rate for the particular element in a study area does not exceed the applicable proxy ceiling or lie outside the proxy range.

785. We reject the use of rates in interconnection agreements that predate the 1996 Act as

---

[1855] *See infra*, Section VII.C.3., discussing generic cost models.

[1856] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

[1857] 47 U.S.C. § 251(f).

a proxy-based ceiling for interconnection and unbundled element rates.[1858] These existing interconnection agreements were not reached in a competitive market environment. Further, such agreements may reflect the divergent bargaining power of the parties to the agreement, various public policy initiatives to advance rural telephone service, or non-monetary *quid pro quos* often found in voluntarily negotiated business arrangements that may be difficult to quantify. There is little basis for us to conclude that rates in these interconnection agreements reflect the forward-looking, incremental cost of interconnection and unbundled network elements. Prices in agreements reached since the 1996 Act are more likely than prior agreements to provide useful information about forward-looking costs, which together with other information may be useful in establishing proxies.

786. In the NPRM, we also raised the issue of using some measure of nationally-averaged cost data as a proxy.[1859] No such study has been submitted into the record in this proceeding.

2. Proxies for Specific Elements

a. Overview

787. Although we encourage states to use an economic cost methodology to set rates for interconnection, unbundled network elements, and collocation, we will permit states unable to analyze an economic costing study within the statutory time constraints to use default proxies in setting and reviewing rates. We set forth below the default proxies for specific network elements. These proxies are interim only. They will apply only until a state sets rates in arbitrations on the basis of an economic cost study, or until we promulgate new proxies based on economic cost models.[1860] We also set forth below the rate structure rules that apply to each of network elements. These rate structure requirements are applicable regardless of whether a state uses an economic cost study or the proxy approach to set rate levels.

[1858] *See* discussion *supra*, Section III.C., concerning the applicability of section 252 to preexisting agreements.

[1859] NPRM at para. 137.

[1860] *See infra*, Section VII.C.3., discussing generic cost models.

b. Discussion

(1) Loops

(a) Comments

788. A number of commenters assert that unbundled loops, in particular, are dedicated facilities, and therefore should be priced on a flat-rated basis.[1861] Sprint suggests that prices for unbundled loops not depend on minutes of use, but rather distance.[1862] MFS urges the Commission to preempt a Texas statute that, it contends, requires incumbent LECs to price unbundled loops on a usage-sensitive basis.[1863]

(b) Discussion

789. Most loop costs are associated with a single customer.[1864] Outside plant between a customer's premises and ports on incumbent LEC switches is typically either physically separate for each individual customer, or has costs that can easily be apportioned among users. We therefore conclude that costs associated with unbundled loops should be recovered on a flat-rated basis. Usage-based rates for an unbundled loop would most likely translate into usage-based rates for new entrants' retail local customers. A retail usage-based rate would distort incentives for efficient use. Customers that had to pay a usage charge would have an incentive not to use the network in situations where the benefit of using the network exceeds the true cost of using the network. Usage-based loop prices would put an entrant at an artificial cost disadvantage when competing for high-volume customers.[1865]

790. In general, we believe that states should use a TELRIC methodology to establish

---

[1861] *See, e.g.*, CompTel comments at 36; Florida Commission comments at 31; MFS comments at 62; *see also* AT&T comments at 67; GSA/DoD comments at 10.

[1862] Sprint comments at 62.

[1863] MFS comments at 62.

[1864] *See MTS and WATS Market Structure*, CC Docket No. 78-72, Phase I, Third Report and Order, 93 FCC 2d 241, 291-297 (1983).

[1865] We note that MFS has filed a separate petition asking the Commission to preempt certain provisions of the Texas statute, which it contends requires incumbent LECs to sell unbundled local loops on a usage-sensitive basis. *See* Public Notice, *Petition for Preemption of Local Entry Barriers Pursuant to Section 253*, 11 FCC Rcd 6578 (Com. Car. Bur. 1996) (*MFS Texas Petition*). We will rule specifically on the Texas statute when we consider the *MFS Texas Petition*.

geographically deaveraged, flat-rate charges for access to unbundled loops. As discussed above, however, we recognize that, in some cases, it may not be possible for carriers to prepare, or for state commissions to review, economic cost studies within the statutory time frame for arbitration proceedings. Because reviewing and approving such cost studies takes time and because many states have not yet begun, or have only recently begun, to develop and examine such studies, it is critical for the near-term development of local competition to have proxies that provide an approximation of forward-looking economic costs and can be used by states almost immediately. These proxies would be used by a state commission until it is able either to complete a cost study or to evaluate and adopt the results of a study or studies submitted in the record. In an NPRM to be issued shortly, we will investigate more fully various long-run incremental cost models in the record with an eye to developing a model that can be used to generate proxies for the forward looking economic costs of network elements. Until such time as we can develop such a model, we have developed the following default proxy ceilings that state commissions that have not completed forward looking economic cost studies may use in the interim as an approximation to the forward looking cost of the local loop.

791. State commissions may use this proxy to derive a maximum (or ceiling) loop rate for each incumbent LEC operating within their state, and may establish actual unbundled loop rates at any level less than or equal to this maximum rate in specific arbitrations or other proceedings. Of course, we are encouraging states to have economic studies completed wherever feasible. Moreover, states will have to replace this proxy ceiling with the results of their own forward looking economic cost study or the results produced by a generic economic cost model that the Commission has approved.[1866]

792. We are adopting a proxy ceiling based on two cost models and rates for unbundled loops allowed by six states that had available to them the results of forward-looking economic cost studies at the time they considered either interim or permanent rates for the unbundled loop element. These states are Colorado, Connecticut, Florida, Illinois, Michigan, and Oregon. Each of these states has used a standard that appears to be reasonably close to the forward-looking economic cost methodology that we require to be used, although possibly not consistent in every detail with our TELRIC methodology.[1867] Generally, these states appear to have included an

---

[1866] *See infra*, Section VII.C.3., discussing generic cost models.

[1867] *See In re: US West Communications, Inc. Filing of Advice Letter No. 2610 In Compliance with Commission Decision No. C96-521 Adopting Emergency Rules (Tariff)*, Docket No. 96S-233T, Decision No. C96-655 (Colorado Commission, June 21, 1996)["*Colorado Decision*"] at 58-64 (interim unbundled loop prices set after review of TSLRIC cost studies); *Re Southern New England Telephone Company*, Order No. 95-06-17, 1995 WL 803837 (Conn. D.P.U.C., December 20, 1995)["*Connecticut Decision*"] at 9-10, 72 (same); *In re: application of City Signal, Inc., for an order establishing and approving interconnection arrangements with Ameritech Michigan*, Case No. U-10647 (Michigan Commission, February 23, 1995) ["*Michigan Decision*"] at 32, 56-57 (setting interim unbundled loop rates based on estimated TSLRIC costs); *In Re: Resolution of petition(s) to*

allocation of forward-looking common costs in their unbundled loop prices. The individual state studies resulted in the following average rates for unbundled local loops: Colorado, $18; Connecticut, $12.95; Florida, $17.28; Illinois, $10.93; Michigan, $10.03; and Oregon, $12.45, computed as set forth below.

793. The Colorado Commission set an interim rate of $18 per month for unbundled loops terminated at the main distribution frame of the LEC switch.[1868] The Connecticut Commission ruled that SNET must provide the following interim unbundled loop prices varying by four zones: metro $10.18; urban $11.33; suburban $15.33; and rural $14.97.[1869] In the absence of further information about customer density or average loop length by zone, we used a simple average equal to $12.95. The Florida Commission set an interim rate for 2-wire loops at $17.00 per month for BellSouth, $15.00 for United/Centel, and $20.00 for GTE.[1870] Using weights equal to the number of loops served by each company in 1994 as reported in the Monitoring Report,[1871] we computed a weighted average price equal to $17.28. Pursuant to its *Customers First* Order, the Illinois Commerce Commission approved tariffs establishing business rates equal to $7.08,

---

establish nondiscriminatory rates, terms and conditions for resale involving local exchange companies and alternative local exchange companies and alternative local exchanges companies pursuant to Section 364.161, Florida Statutes, Docket No. 950984-TP, Order No. PSC-96-0444-FOF-TP, (Florida Commission, March 29, 1996)["*Florida Decision I*"] at 16 (interim unbundled loop prices set with reference to BellSouth cost studies); *In Re: Resolution of petition(s) to establish nondiscriminatory rates, terms and conditions for resale involving local exchange companies and alternative local exchange companies and alternative local exchanges companies pursuant to Section 364.161, Florida Statutes*, Docket No. 950981-TP, Order No. PSC-96-0811-FOF-TP (Florida Commission, June 24, 1996)["*Florida Decision II*"] at 25-26 (setting rates after review of GTE and United/Centel cost studies); *In re: Investigation into the Cost of Providing Telecommunications Services*, Order No. 96-188, (Oregon Commission, July 19, 1996)["*Oregon Decision*"] at 78 n.61 (interim unbundled loop prices generally based on LRIC estimates plus applicable group related costs, and an additional contribution for recovery of joint and common costs); *Illinois Bell Telephone Company Proposed introduction of a trial of Ameritech's Customers First Plan in Illinois*, Docket Nos. 94-0096/94-0117/94-0146/94-0301 (Illinois Commission, April 7, 1995)["*Customers First* Order"] at 54, 61 (rates set with reference to Ameritech's LRSIC studies).

[1868] *Colorado Decision* at 66.

[1869] *Connecticut Decision* at 74.

[1870] *Florida Decision I* at 19; *Florida Decision II* at 25-26.

[1871] Monitoring Report, CC Docket No. 87-339, May 1996 (listing the following number of loops by company: GTE, 1,909,172; United/Centel, 1,627,314; BellSouth, 5,328,280).

$10.92, and $14.45, and residential rates equal to $4.59, $8.67, and $12.14 in three density zones.[1872] Based on data from Table 2.5, page 20 of the Common Carrier Statistics, 1995 Preliminary, we found a 36 percent - 64 percent business residential split. Using Illinois Commission data for number of households in each density zone (996,750 in zone A; 2,788,759 in zone B; 4,594,567 in zone C), we computed an average loop cost of $10.93. The Michigan Commission approved transitional rates of $8.00 per loop for business and $11 per loop for residence.[1873] Based on Common Carrier Statistics, 1995 Preliminary data, we computed a 32 percent - 68 percent business-residential split in Michigan, which leads to an average rate of $10.03. The Oregon Commission set the rate for a "basic 2-wire loop set" at $11.95 plus $0.50 for a network access channel connection, for a total price of $12.45.[1874]

794. In order to set a proxy ceiling for unbundled loop elements we make use of the two cost models for which nationwide data are available and upon which parties have had the opportunity to comment in this proceeding. These models are the Benchmark Cost Model (*BCM*)[1875] and the *Hatfield 2.2*.[1876] Based on our current information, we believe that both these models are based on detailed engineering and demographic assumptions that vary among states, and that the outputs of these models represent sufficiently reasonable predictions of relative cost differences among states to be used as set forth below to set a proxy ceiling on unbundled loop prices for each state. We do not believe, however, that these model outputs by themselves necessarily represent accurate estimates of the absolute magnitude of loop costs. As we discuss below, further analysis is necessary in order to evaluate fully the procedures and input assumptions that the models use in order to derive cost estimates. Furthermore, in the case of *BCM*, model outputs include costs in addition to the cost of the local loop. In order to correct for these considerations, we have developed a hybrid cost proxy in the following manner. First, we have applied a scaling factor to the cost estimates of each model. This scaling is based on the actual rates computed for unbundled loop elements in the six states referred to above. Specifically we have multiplied the cost estimate produced by each model in each state by a

---

[1872] *See* Ameritech Tariff, Ill. C.C. No. 20, Part 19, Section 1, issued October 23, 1995.

[1873] *Michigan Decision* at 94.

[1874] *Oregon Decision* at Appendix C, p.1.

[1875] *Benchmark Cost Model: A Joint Submission by MCI Communications, Inc., NYNEX Corporation, Sprint Corporation, U S West, Inc.* (December 1995), submitted by MCI Communications, Inc., NYNEX Corp., Sprint/United Management Corp., U S West, Inc. on July 24, 1996 (*BCM*). For a more detailed discussion of the *BCM*, *see infra*, Section VII.C.3.

[1876] *Hatfield Model, Version 2.2, Release 1*, (Hatfield Associates, Inc., March 1996), submitted by AT&T and MCI on May 16, 1996 (*Hatfield 2.2*); *see also* AT&T reply at Appendix D (Update of the Hatfield Model Version 2.2, Release 1). *See infra*, Section VII.C.3., for a more detailed discussion of the various versions of the *Hatfield* model.

factor equal to the unweighted average of rates adopted by state commissions in the six states, divided by the unweighted average of the model cost estimates for the same six states. Our hybrid cost proxy is computed as the simple average of the scaled cost estimates for the two models in each of the 48 contiguous states and the District of Columbia. Neither *BCM* nor *Hatfield 2.2* provide cost estimates for Alaska and only the *BCM* provides an estimate for Hawaii. Our default loop cost proxies for Hawaii and Puerto Rico are based on the default loop cost proxies of the states that most closely approximate them in population density per square mile.[1877] We are not setting default loop cost proxies in this Order for Alaska or for any of the remaining non-contiguous areas subject to the 1996 Act requirement that incumbent LECs offer unbundled loop elements. We are not establishing default loop cost proxies for these areas because we are unsure that comparisons of the population densities of the continental states and of Alaska and other non-contiguous areas subject to the 1996 Act fully capture differences in loop costs. Regulatory authorities in those areas may seek assistance from this Commission should default loop cost proxies be needed before they have completed their investigations of the forward-looking costs of providing unbundled loop elements. Since our intention is to establish a ceiling for unbundled loop rates, we believe that it is necessary to take account of the variation in the data that we have used for scaling. While the six states that we considered appear to have based their rates on forward-looking economic cost pricing principles, the actual rates that they approved appear to reflect other factors as well. Furthermore, because only a small number of states have conducted such studies, some upward adjustment is warranted as a safety margin to ensure that the ceiling captures the variation in forward-looking economic costing prices on a state-by-state basis. We have therefore chosen to adjust the hybrid cost estimates upward by five percent for each state. A table listing the proxy ceilings on a statewide average basis is contained in Appendix D.

795. A number of parties have opposed the use of either the *Hatfield* model or *BCM*.[1878] Some critics, for example, have argued that the models may lead to inaccurate cost estimates since these estimates assume that a network is built "from scratch."[1879] Others have criticized specific procedures that have been used in the models to estimate both operating expenses and capital costs. As discussed below in Section VII.C.3., we believe that these criticisms may have merit. In a future rulemaking proceeding, we intend to examine in greater detail various forward looking economic cost models. For the purposes of setting an interim proxy, however, we note

---

[1877] There is a strong (negative) correlation between population density and the loop costs reported by all the cost models. The correlation is significant at the 5% level. Population densities are from The Statistical Abstract of the United States 1995, Table Number 23. For Puerto Rico, land area is from Table 361 and population is from Table 1345.

[1878] For a more detailed discussion of these generic cost models, *see infra*, Section VII.C.3.

[1879] *See, e.g.*, Florida Commission comments at 28-29; USTA comments at 54 n.45; Rural Tel. Coalition reply at 35.

that the criticisms have been directed largely toward the absolute level of cost estimates produced by the models, rather than the relative cost estimates across states. Since our hybrid proxy ceiling explicitly scales the model cost estimates based on existing state decisions and uses the model results simply to compute relative prices, we believe that these criticisms do not apply in the present context.

796. We also note that a third model, the *BCM 2*,[1880] could have been used in the construction of our interim cost proxy by simply taking the scaled cost estimates from three cost models instead of two. We have chosen not to follow this approach since parties have not had an opportunity to comment on the possible deficiencies of the *BCM 2*. For comparison purposes, however, we have computed the corresponding ceiling cost estimates, and have found that the scaled costs using the three model proxy are very similar to the estimated costs that were derived using the two models.[1881]

797. As discussed above, we believe that cost-based rates should be implemented on a geographically deaveraged basis. We allow states to determine the number of density zones within the state, provided that they designate at least three zones, but require that in all cases the weighted average of unbundled loop prices, with weights equal to the number of loops in each zone, should be less than the proxy ceiling set for the statewide average loop cost set forth in Appendix D.

798. As noted above, we have not yet had sufficient time to evaluate fully any of the cost models that have been submitted in the record, and our hybrid proxy is therefore intended to be used only on an interim basis. We believe that the methodology is consistent with forward-looking cost studies, but we also recognize that there may be situations in which forward looking loop costs will differ from computed costs, and accordingly, we have increased the state average loop costs by five percent and established the proxy as a ceiling. We emphasize that use of the hybrid proxy model can be superseded at any time by a full forward looking economic cost study that follows the guidelines set forth in this order. In addition, we are currently in the process of evaluating the more detailed cost models that have been submitted in the record,[1882] and will issue a further notice on the use of these models in the near future.

[1880] *Benchmark Cost Model 2* (July 1996), submitted by Sprint Corp. and U S West, Inc., on July 24, 1996 (*BCM 2*). For a more detailed discussion of this generic cost model, *see infra*, Section VII.C.3.

[1881] The coefficient of correlation is 0.991. Since the models are deterministic, this correlation does not reflect any relevant statistical properties of the models.

[1882] For a more detailed discussion of the cost models submitted in this docket, *see infra*, Section VII.C.3.

(2) Local Switching

(a) Comments

799. Several IXCs propose that local switching rates be part flat-rated and part usage-sensitive. LDDS argues that the price of the unbundled switching element should reflect as closely as possible the manner in which switching costs are incurred. It believes that line-related costs should be recovered through a flat per-line capacity charge, based on a contracted-for number of lines, with an additional usage-based trunking port charge and a combination of per-line and usage-based charges to recover busy hour related costs.[1883] AT&T similarly argues that switching rates should be based on a capacity charge for line-specific costs plus a usage sensitive charge based on calling volume.[1884] MCI states that switching costs are a function of line connections, trunk connections, and busy hour demand on the switch matrix and processor. Hence, the rate for the switching element should have a sub-element price relating to each sub-element, set to recover the associated TSLRIC.[1885] Sprint, on the other hand, contends that the charge for the local switching element should consist of two flat-rated charges, one based on the number of interconnector lines receiving dedicated access to the first point of concentration in the switch, and the second on the number of links between the termination equipment and the switch that an interconnector has ordered to provide it with switching capacity at its desired grade of service.[1886] CompTel argues that trunk port charges should be usage sensitive because trunk ports are used by multiple parties and that the network element for end-office serving wire center (provided by tandem switching) should be priced on a per minute basis.[1887]

800. Time Warner argues that pricing switched-based network elements on a flat-rated basis could give non-facilities-based competitors artificially created cost advantages over those who choose to invest in the development of competing networks.[1888] It also argues that nothing in the 1996 Act suggests that switches should not be priced based on a per-use basis rather than a

---

[1883] LDDS comments at 57.

[1884] AT&T comments at 68.

[1885] MCI comments at 30.

[1886] Sprint comments at 35, 62.

[1887] CompTel comments at 36, 45.

[1888] Time Warner comments at 59.

per-line or per-partitioned portion of the switch basis.[1889] NEXTLINK supports the use of rate structures that reflect peak and off-peak costs, but notes that the advantage of such structures must be balanced against the disadvantages of complexity and possible disputes that could arise with regard to more complex billing systems.[1890] The Washington Commission notes that the switched access price structure for interexchange access is usage sensitive, but it states that usage-sensitive pricing structures for switched access are inappropriate for local interconnection services in Washington because state law prohibits mandatory measured local service. To the extent that network element costs are driven by peak demand, the Washington Commission states that rates should reflect that tendency. It would prefer to see rate structures that more accurately reflect peak, rather than average demand and has expressed a strong interest in flat-rated port charges. The Washington Commission states that a flat rate based upon cost of providing capacity at peak load is possibly the most economically correct pricing mechanism; off-peak usage then is at virtually zero cost.[1891]

801. LDDS and AT&T argue that there should be no additional charges for vertical features provided by the switch, as the cost of providing those features should already be reflected in the charge for unbundled local switching.[1892] MCI has a similar view, arguing that, because incumbent LECs do not incur the cost of vertical features on a usage basis, custom calling features should be included in the price for unbundled local switching.[1893]

802. Incumbent LECs and Sprint, however, argue that vertical features are retail services offered to end users today, and must be purchased by the competitor under the wholesale rate provision of the 1996 Act.[1894] In making that argument, however, Sprint notes that although it is not technically feasible to unbundle vertical services the costs of such services can be identified and should be excluded from the price of the local switching element.[1895] Bell Atlantic notes that services currently sold at a loss are subsidized by vertical service offerings. It asserts that, if these offerings were treated as unbundled elements that must be provided at cost instead of

---

[1889] Time Warner comments at 59.

[1890] NEXTLINK comments at 30.

[1891] Washington Commission comments at 29-30.

[1892] AT&T comments at 21 n.22; LDDS comments at 56-57.

[1893] MCI comments at 31.

[1894] *See, e.g.*, SBC comments at 38; Sprint comments at 36-37.

[1895] Sprint comments at 37 n.15.

wholesale retail services, then a serious takings issue would arise.[1896] ALLTEL contends that the Commission should not permit the 1996 Act's resale price standards to be undercut by carriers attempting to mimic LEC networks by assembling unbundled elements obtained at below cost prices.[1897] USTA contends that section 251(c) does not allow carriers to assemble unbundled network elements to reconstruct and provide retail services offered by the incumbent LECs.[1898] The Competition Policy Institute argues in response, that the existence of unbundled network elements should not be presumed to be a substitute for a resold service.[1899] NYNEX argues that a competitor should not be allowed to obtain resold local exchange service and ask for vertical features at cost-based rates. It argues that the two competitive vehicles were intended to meet different strategic needs; they were not intended to provide opportunities for arbitrage.[1900]

803. Several commenters included estimates of the cost for end-office switching. MCI provides an estimate of the cost of end-office switching as calculated by the *Hatfield 2* model.[1901] Using the least cost, most efficient technology available in the market at the time, MCI estimates that the TSLRIC of end-office switching is equal to 0.18 cents ($0.0018) per minute of use.[1902] AT&T provides an updated version of the *Hatfield 2* model, the *Hatfield 2.2*, which treats the incumbent LECs' current wire center locations as "fixed" nodes in a reconstructed network.[1903] Cox reports that the *Hatfield 2.2* model estimates that average TSLRIC of end office switching

---

[1896] Bell Atlantic reply at Exhibit 2 (Declaration of Richard A. Epstein), p.7.

[1897] ALLTEL reply at 7.

[1898] USTA reply at 8.

[1899] Competition Policy Institute comments at 26.

[1900] NYNEX comments at 30, 36, 39.

[1901] MCI comments at Attachment 1, "The Cost of Basic Network Elements, Theory, Modeling, and Policy Implications," prepared for MCI by Hatfield Assoc., Inc.

[1902] *Id.* at 34; *see also* NCTA comments at Attachment 1 (Declaration of Bruce M. Owen), p. 34-35 (converting the *Hatfield 2* estimate for end-office switching and switch port costs into a per minute rate of 0.26 cents).

[1903] *Hatfield Model, Version 2.2, Release 1*, (Hatfield Associates, Inc., March 1996), submitted by AT&T and MCI on May 16, 1996 (*Hatfield 2.2*); *see also* AT&T reply at Appendix D (Update of the Hatfield Model Version 2.2, Release 1), p.1-3.

for most states clusters around 0.2 cents ($0.002) per minute of use.[1904]

804. GTE criticizes the *Hatfield 2.2* model and its assumptions, arguing that the Hatfield model suffers from serious inaccuracies and produces results that are inconsistent with what can actually be observed.[1905] GTE reports that the Cost Proxy Model, which was submitted by Pacific Telesis,[1906] estimates the average cost of routing traffic through end-office switches is equal to 0.35 cents ($0.0035) per minute of use.[1907]

805. In pleadings filed in the *LEC-CMRS Interconnection* proceeding,[1908] Cox asserts that the average incremental cost of inter-office transport and termination of traffic is 0.2 cents ($0.002) per minute of use.[1909] In the same proceeding, U S West argues that Cox's estimate of 0.2 cents per minute of use ignores the large differential between the costs of terminating calls during peak and off-peak hours.[1910] USTA claims that the average incremental cost of call

---

[1904] Letter from J.G. Harrington, Dow, Lohnes & Albertson, on behalf of Cox Communications, to William F. Caton, Acting Secretary, FCC, June 20, 1996, in CC Docket No. 95-185, at Tab 2 (Review of Record on LEC Local transport and Termination Costs Finding from LEC Cost Studies), p.3 (*Cox June 20, 1996 Ex Parte*).

[1905] Letter from Whitney Hatch, Assistant Vice President Regulatory Affairs, GTE, to William F. Caton, Acting Secretary, FCC, July 11, 1996 at Attachment 2 (Economic Evaluation of Version 2.2 of the Hatfield Model).

[1906] *The Cost Proxy Model* (INDETEC International, 1996), submitted by Pacific Telesis Group on June 7, 1996 (*CPM*).

[1907] Letter from Whitney Hatch, Assistant Vice President Regulatory Affairs, GTE, to William F. Caton, Acting Secretary, FCC, July 11, 1996 at Attachment 2 (Economic Evaluation of Version 2.2 of the Hatfield Model), pp.16-17.

[1908] *Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket No. 95-185, Notice of Proposed Rulemaking, 11 FCC Rcd 5020, 5038 (1996) (*LEC -CMRS Interconnection NPRM*);

[1909] Letter from J.G. Harrington, Dow, Lohnes & Albertson, on behalf of Cox Communications, to William F. Caton, Acting Secretary, FCC, June 20, 1996, in CC Docket No. 95-185 at Tab 2 (Review of Record on LEC Local Transport and Termination Costs Finding from LEC Cost Studies), pp.1-2; *see also* Letter from Robert F. Roche, CTIA, to William F. Caton, Acting Secretary, FCC, December 8, 1995, in CC Docket No. 94-54, (Incremental Cost of Local Usage, Brock Paper No. 3), p.1.

[1910] U S West comments in CC Docket No. 95-185 at Attachment A (A Response to Dr. Gerald Brock), p.13.

termination is 1.3 cents ($0.013) per minute of use.[1911]

806. In response to the *LEC-CMRS Interconnection NPRM,* many commenters assert that the majority of CMRS providers interconnect with incumbent LEC networks at incumbent LECs' tandem offices.[1912] U S West asserts that Cox's estimate of 0.2 cents ($0.002) per minute of use underestimates the actual cost of transporting and terminating traffic, and claims that, using the same data and methodology as Cox, the incremental cost of transporting and terminating traffic through the tandem is approximately three times higher than Cox's estimate.[1913] In the same proceeding, AirTouch, relying on 1994 testimony before the Georgia Commission, asserts that the LRIC of transporting and terminating a call through the tandem equals approximately 0.49 cents ($0.0049) for the first minute of a call and 0.12 cents ($0.0012) for each additional minute of use.[1914] This estimate is based on the presumption that it should cost roughly half as much to complete a call interchanged at a tandem switch as it does to both originate and terminate a call entirely on one network.[1915] Pacific Bell, asserts that the average LRIC for termination of calls under "Feature Group B," which appears to include terminations at tandems switches in addition to end-office terminations, equals 0.62 ($0.0062) cents per minute of use.[1916]

807. State commissions, that have set rates for the transport and termination of traffic, generally set rates for terminations where parties interconnect at either the end office or the tandem office.[1917] The Maryland Commission has set reciprocal and symmetrical rates for the transport and termination of traffic based, among other things, on a rate proposal calculated by a

---

[1911] USTA comments in CC Docket No. 95-185 at Attachment (Bill and Keep: A Bad Solution to a Non-Problem), pp.9-10.

[1912] *See, e.g.*, U S West comments in CC Docket No. 95-185 at Attachment A (A Response to Dr. Gerald Brock), p.13.

[1913] *Id.*

[1914] AirTouch comments in CC Docket No. 95-185 at 32-33.

[1915] *Id.*

[1916] Pacific Bell comments in CC Docket No. 95-185 at Exhibit B (Statement of Professor Jerry A. Hausman) at p.14.

[1917] *See, e.g.*, Maryland Commission comments at Appendix B (Maryland Commission Order No. 72348, Case No. 8584 Phase II), p.28-32.

staff witness.[1918] In the Maryland proceeding, the actual cost of tandem and end-office switch terminations are considered proprietary and were, therefore, not directly reported, but the staff witness testified that the calculation of direct, shared, and common costs is less than one-half his proposed rate of 0.6 cents ($0.006) per minute of use for terminations routed through the tandem-office switch.[1919] The Maryland Commission ultimately adopted rates of 0.3 cents ($0.003) per minute of use end-office-switch terminations and 0.5 cents ($0.005) per minute of use for terminations at the tandem switch.[1920]

808. The Illinois Commission has adopted a rate equal to 0.5 cents ($0.005) per minute of use for terminations routed directly through end-office switches and 0.75 cents ($0.0075) per minute of use for calls routed through tandem switches.[1921] Illinois's rate includes an element for recovering a "contribution" over and above the long-run service incremental cost of termination.[1922] Illinois arrived at its final rates by identifying the proposed rates that would pass imputation tests.[1923] In Massachusetts, NYNEX testified that the average marginal cost of end-office switching equals 0.129 ($0.00129) cents per minute of use.[1924] Cox reports that the Florida staff, after reviewing local service cost support data filed by GTE and Centel/United, concluded that the sum of the estimated TSLRIC for end-office switching and the LRIC for tandem-office switching and transport equals 0.25 cents ($0.0025) per minute of use.[1925]

809. The peak-period interconnection rates in New York between NYNEX and other facilities-based, full service local exchange providers are set at 0.74 cents ($0.0074) per minute of

---

[1918] *Id.*

[1919] *Id.* at 29.

[1920] *Id.* at 32.

[1921] Illinois Commission comments at Attachment C (Illinois Commerce Commission Docket No. 94.0096), pp.83-86, 98.

[1922] *Id.*

[1923] *Id.* at 85.

[1924] *See* Mass. Commission comments at Attachment 3 (Testimony of Paula L. Brown, Managing Director, NYNEX Corporation, in Massachusetts Dept. of Pub. Util. Docket No. 93-125, Workpaper 2), June 14, 1993, p.6.

[1925] *Cox June 20, 1996 Ex Parte* at 4 (*citing* Florida Docket No. 950985-TP).

use (end office) and 0.98 cents ($0.0098) per minute of use (tandem).[1926] Off-peak rates are 0.27 cents ($0.0027) (end office) and 0.29 cents ($0.0029) (tandem).[1927] The Michigan Commission has established mutual compensation rates of 1.5 cents ($0.015) per minute of use for calls passing directly through an end-office switch or through tandem office switches.[1928]

(b) Discussion

810. We conclude that a combination of a flat-rated charge for line ports, which are dedicated to a single new entrant, and either a flat-rate or per-minute usage charge for the switching matrix and for trunk ports, which constitute shared facilities, best reflects the way costs for unbundled local switching are incurred and is therefore reasonable. We find that there is an insufficient basis in the record to conclude that we should require two flat rates for unbundled local switching charges as proposed by Sprint.

811. Based on the record in this proceeding and in the *LEC-CMRS Interconnection* proceeding, we conclude that a range between 0.2 cents ($0.002) per minute of use and 0.4 cents ($0.004) per minute of use for unbundled local switching is a reasonable default proxy. In setting this default price range, we consider the range of evidence in the record, and believe that the most credible studies fall at the lower end of this range.[1929] However, so as to minimize disruption for any state that has set a rate only marginally outside this range, we will grandfather any state that has set a rate at 0.5 cents ($0.005) per minute of use or less pending completion of an economic study pursuant to the methodology set forth in this Order.

812. The forward-looking cost studies contained in the record estimate that the average cost of end-office switching ranges from 0.18 cents ($0.0018) per minute of use[1930] to 0.35 cents

---

[1926] *Competition, The State Experience* at 81 (compilation of written responses by state commission staffs to questions by FCC staff, compiled by NARUC) (March 8, 1996).

[1927] *Id.*

[1928] Michigan Commission comments at Attachment 1 (State of Michigan, Case No. U-10647, Opinion and Order, February 23, 1995), p.28.

[1929] *See, e.g.*, Maryland Commission comments at Appendix B (Maryland Commission Order No. 72348, Case No. 8548 Phase II), p.28-32; Letter from Robert F. Roche, CTIA, to William F. Caton, Acting Secretary, FCC, December 8, 1995, in CC Docket No. 94-54 (Incremental Cost of Local Usage, Brock Paper No. 3), p.1; *Hatfield Model, Version 2.2, Release 1*, (Hatfield Associates, Inc. March 1996), submitted by AT&T and MCI on May 16, 1996; AT&T reply at Appendix D (Update of the Hatfield Model, Version 2.2, Release 1).

[1930] *See* MCI comments at Attachment 1, "The Cost of Basic Network Elements, Theory, Modeling, and Policy Implications," prepared for MCI by Hatfield Assoc., Inc. p.34.

($0.0035) per minute of use.[1931] Maryland and Florida have adopted rates based on forward-looking economic cost studies that fall within the default price range we are adopting.[1932] NYNEX's estimate of 0.129 cents ($0.00129) per minute of use, in the Massachusetts proceeding, is estimate an estimate of the marginal cost of end-office switching.[1933] As discussed above, we generally expect studies estimating marginal costs to generate estimates that are less than estimates derived from TELRIC-based studies. We, therefore, conclude that 0.2 cents ($0.002) per minute of use is a reasonable lower end of the price range for end-office switching.

813. USTA's estimate of 1.3 cents ($0.013) appears to be an outlier that is significantly higher than the other estimates.[1934] We find that USTA's estimate does not represent an appropriate cost model for termination of traffic. USTA's estimate is based on the high end of a set of econometric estimates of LEC-reported cost data rather than an independent cost estimate, and USTA gives no explanation of why we should regard this as the best estimate. In addition, USTA's figure is derived, at least in part, from studies that attempt to measure the incremental cost of end-to-end use of the network for local calls, not the cost of local switching. Pacific Bell's study of the average LRIC of a call terminating under "Feature Group B"[1935] apparently includes terminations at tandem switches in addition to end-office terminations.

814. Michigan and Illinois have adopted rates for transport and termination of traffic that are higher than the default price range we adopt for end-office switching.[1936] Michigan, which established mutual compensation rates of 1.5 cents ($0.015) per minute of use, did not review a

---

[1931] Letter from Whitney Hatch, Assistant Vice President Regulatory Affairs, GTE, to William F. Caton, Acting Secretary, FCC, July 11, 1996 at Attachment 2 (Economic Evaluation of Version 2.2 of the Hatfield Model), pp.16-17.

[1932] *See* Maryland Commission comments at Appendix B (Maryland Commission Order No. 72348, Case No. 8584 Phase II), pp.28-32; *Cox June 20, 1996 Ex Parte* at 4.

[1933] *See* Mass. Commission comments at Attachment 3 (Testimony of Paula L. Brown, Managing Director, NYNEX Corporation, in Massachusetts Dept. of Pub. Util. Docket No. 93-125, Workpaper 2), p.6.

[1934] USTA comments in CC Docket No. 95-185 at Attachment (Bill and Keep: A Bad Solution to a Non-Problem), pp.9-10.

[1935] Pacific Bell comments in CC Docket No. 95-185 at Exhibit B (Submission of Jerry A. Hausman), para. 32.

[1936] Michigan Commission comments at Attachment 1 (State of Michigan, Case No. U-10647, Opinion and Order, February 23, 1995), p.28; Illinois Commission comments at Attachment C (Illinois Commerce Commission Docket No. 94.0096), pp.83-86, 98.

forward-looking cost study.[1937] Illinois's 0.5 cents ($0.005) per minute rate for termination through the end office is just outside the range we are establishing. First, as previously stated, we are grandfathering rates of 0.5 cents ($0.005) per minute or lower. Further, we do not believe Illinois's rate overrides the weight of evidence in the record, which supports the range we are establishing.

815. States that do not calculate the rate for the unbundled local switching element pursuant to a forward-looking economic cost study may, in the interim, set the rate so that the sum of the flat-rated charge for line ports and the product of the projected minutes of use per port and the usage-sensitive charges for switching and trunk ports, all divided by the projected minutes of use, does not exceed 0.4 cents ($0.004) per minute of use and is not lower than 0.2 cents ($0.002) per minute of use. A state may impose a rate for unbundled local switching that is outside this range if it finds that a forward-looking economic cost study shows a higher or lower rate is justified. States that use our proxy and impose flat-rated charges for unbundled local switching should set rates so that the price falls within the range of 0.2 cents ($0.002) per minute of use and 0.4 cents ($0.004) per minute of use if converted through use of a geographically disaggregated average usage factor. A default price range of 0.2 cents ($0.002) per minute of use and 0.4 cents ($0.004) per minute of use should allow carriers the opportunity to recover fully their additional cost of terminating a call including, according to Maryland's study, a reasonable allocation of common costs. We observe that the most credible studies in the record before us fall at the lower end of this range and we encourage states to consider such evidence in their analysis.

816. With respect to the argument that vertical features should be priced pursuant to the resale price standards, we concluded earlier that vertical features are part of the unbundled local switching element, because they are provided through the operation of hardware and software comprising the "facility" that is the switch.[1938] Accordingly, the pricing standard in 252(d)(1) applies to vertical features as part of the functionality of the switch. As previously discussed, allowing new entrants to purchase switching and vertical features as part of the local switching network element is an integral part of a separate option Congress has provided for new entrants to compete against incumbent LECs.[1939]

[1937] Michigan Commission comments at Attachment 1 (State of Michigan, Case No. U-10647, Opinion and Order, February 23, 1995), p.28.

[1938] *See supra*, Section V.J., discussing unbundled local switching.

[1939] "[I]t is unlikely that competitors will have a fully redundant network in place when they initially offer local service, because the investment necessary is so significant. Some facilities and capabilities . . . will likely need to be obtained from the incumbent [LEC] as network elements pursuant to new section 251." Joint Explanatory Statement at 148.

817. The 1996 Act establishes different pricing standards for these two options available to new entrants -- resale of services pursuant to section 251(c)(4) and unbundled elements pursuant to section 251(c)(3). Where the new entrant purchases vertical features as part of its purchase of an unbundled local switching element, the price of that element, including associated vertical features, should be determined according to section 252(d)(1). The availability of vertical services as part of a wholesale service offering is distinct from their availability as part of the local switching network element. In these circumstances, allowing the new entrant to combine unbundled elements with wholesale services is an option that is not necessary to permit the new entrant to enter the local market.

818. As to Bell Atlantic's takings argument, we concluded above that the pricing of unbundled elements according to the just and reasonable standard in section 251(c)(2) and (c)(3), and applied in section 252(d)(1), is not an unconstitutional taking.[1940] That analysis, which looks at the overall rates established by our regulations, applies with equal force to the pricing of unbundled local switching, inclusive of associated vertical features. A forward-looking economic cost methodology enables incumbent LECs to recover a fair return on their investments and Bell Atlantic has provided no specific evidence to the contrary. We conclude that our pricing methodology for unbundled local switching, inclusive of associated vertical features, provides just compensation to incumbent LECs.

(3) Other Elements

(a) Comments

819. AT&T argues that charges for common transport should be usage sensitive, and that signaling links, signal transfer point, and service control point should be priced using a combination of flat-rated capacity charges and usage-sensitive charges.[1941] The Ohio Consumers' Counsel agrees with AT&T about the principles of rate structure, but argues that the specific prescriptions for rate structure proposed by AT&T are unnecessary if the principles are adopted.[1942] Sprint asserts that common transport rates should be per-minute charges that vary with distance.[1943] MCI argues that trunk connection costs should be recovered through a minute-

[1940] *See supra*, Section VII.B.2.a.(3)(c).

[1941] AT&T comments at 68.

[1942] Ohio Consumers' Counsel reply at 16.

[1943] Sprint comments at 63.

of-use charge.[1944] AT&T argues that dedicated transport rates should be non-usage sensitive.[1945]

(b) Discussion

820. The primary categories of network elements identified in this Order, other than loops and switching, are transport, signaling, and collocation. Our rule that dedicated facilities shall be priced on a flat-rated basis[1946] applies to dedicated transmission links because these facilities are dedicated to the use of a specific customer.

821. For dedicated transmission links, states must use existing rates for interstate dedicated switched transport as a default proxy ceiling. We believe these rates are currently at or close to economic cost levels. Such rates were set based on interstate special access rates, which we found based on the record in the *Transport* proceeding were relatively close to costs.[1947] These interstate access rates originally were based on incumbent LEC accounting costs, rather than a forward-looking economic cost model. Since 1991, however, incumbent LEC interstate access rates have been subject to price cap regulation, and have therefore been disengaged from embedded costs.[1948]

822. Typically, transmission facilities between tandem switches and end offices are shared facilities. Pursuant to our rate structure guidelines, states may establish usage-sensitive or flat-rate charges to recover those costs. For shared transmission facilities between tandem switches and end offices, states may use as a default proxy ceiling the rate derived from the incumbent LEC's interstate direct trunked transport rates in the same manner that we derive presumptive price caps for tandem switched transport under our interstate price cap rules, using the same

---

[1944] MCI comments at 30.

[1945] AT&T comments at 67.

[1946] *See supra*, Section VII.B.3.

[1947] *First Transport Order*, 7 FCC Rcd at 7028 (1992); *Transport Rate Structure and Pricing*, CC Docket No. 91-213, Third Memorandum Opinion and Order on Reconsideration and Supplemental Notice of Proposed Rulemaking, 10 FCC Rcd 3030, 3038-39 (1994).

[1948] Interstate access rates for dedicated transport vary by region, type of circuit, mileage, and other factors. For example, BellSouth's entrance facility charge, for transport from an IXC's point of presence to a BellSouth serving wire center, is $134 monthly per DS1 circuit ($5.58 per derived voice grade circuit) and $2,100 monthly per DS3 circuit ($3.13 per derived voice grade circuit). Dedicated transport for 10 miles of interoffice transmission between a serving wire center and an end office is $325 monthly per DS1 circuit ($13.54 per derived voice grade circuit) and $2,950 monthly per DS3 circuit ($4.39 per derived voice grade circuit). Installation, multiplexing, and other transport-related charges may also apply.

weighting and loading factors.[1949] We conclude above that interstate direct-trunked transport rates provide a reasonable default proxy ceiling for unbundled dedicated transport rates. When we restructured the incumbent LECs' interstate transport rates to be more closely aligned with cost, we derived presumptive tandem-switched transmission rate levels from direct-trunked transport rates.[1950] This proxy ceiling for shared transmission facilities between tandem switches and end offices, therefore, should be similarly derived.

823. The United States Court of Appeals for the District of Columbia Circuit recently remanded our interim transport rules.[1951] The court concluded that the Commission had not provided sufficient justification for its method of establishing the rate level of the interstate switched access rate element for tandem switching.[1952] We do not believe, however, that the *CompTel v. FCC* decision is inconsistent with the rules we establish here because the decision did not address or criticize the Commission's determination of the rates for dedicated transport or tandem-switched transport links. Because our proxies do not involve the interstate access rate for tandem switching, they are not inconsistent with the court's analysis.

824. Tandem switching also employs shared facilities. States may, therefore, establish usage-sensitive charges to recover tandem-switching costs. For those states that cannot complete a forward-looking economic cost study within the arbitration period or cannot devote the necessary resources to such a review, we establish a default rate ceiling of 0.15 cents ($0.0015) per minute of use. The additional cost of termination at a tandem in comparison to termination at an end office consists of the cost of tandem switching and the cost of tandem-switched transport transmission. Illinois and Maryland have adopted rates for the transport and termination of traffic from the tandem switch that are, respectively, 0.25 cents ($0.0025) per minute of use and 0.2

[1949] Specifically, when the transport rate restructure was implemented, the initial levels of tandem-switched transmission rates were presumed reasonable if they were based on a weighted per-minute equivalent of direct-trunked transport DS1 and DS3 rates that reflects the relative number of DS1 and DS3 circuits used in the tandem to end office links, calculated using a loading factor of 9000 minutes per month per voice-grade circuit. 47 C.F.R. § 69.111.

[1950] *First Transport Order*, 7 FCC Rcd at 7018-19. Interstate access rates for tandem-switched transport vary by region and mileage. The average charge by RBOCs in Density Zone 1 for transport termination and one mile of switched common transport facility between a tandem switching office and end office equals 0.033 cents ($0.000331) per minute. For a five-mile facility, the average charge is 0.048 cents ($0.000479) per minute; for a ten-mile facility, 0.066 cents ($0.000664) per minute.

[1951] *Competitive Telecommunications Ass'n v. FCC*, No. 95-1168 (D.C. Cir. April 28, 1996).

[1952] The court accepted both AT&T's claim that the Commission had not justified the allocation of 80 percent of the tandem revenue requirement to the TIC and only 20 percent to the tandem element, and CompTel's argument that the Commission had not justified its allocation of overheads to the tandem element.

cents ($0.002) per minute of use, higher than rates for termination at end office switches.[1953] In both instances, our default rate ceiling for tandem switching constitutes at least 60 percent of the implicit tandem switching and transport to the end office switch. We, therefore, find the default rate ceiling we adopt for tandem switching to be consistent with both Illinois's and Maryland's adopted rates for transport and switching of traffic from the tandem office. States that use our proxy and impose flat-rated charges for tandem switching should set rates so that the price does not exceed 0.15 cents ($0.0015) per minute of use if converted through use of a geographically disaggregated usage factor.

825. Rates for signaling and database services should be usage-sensitive, based either on the number of queries or the number of messages, with the exception of the dedicated circuits known as signaling links, which should be charged on a flat-rated basis. Usage charges of this type appear to reflect most accurately the underlying costs of these services.[1954] Interstate access rates for most of these elements have been justified using the price caps new services test, which roughly approximates the results of a forward-looking economic cost study.[1955] In addition, the costs of these services were forward-looking, in that the services were completely new and hence, by definition, used the best-available technology. Thus, we establish as a default proxy ceiling for these elements corresponding interstate access charges for these elements.[1956] For elements that have not been subject to the new services test, states may establish proxy ceilings by identifying the direct costs of providing the element and adding a reasonable allocation of joint and common costs. Because we expect that the joint and common costs associated with the forward-looking cost of network elements are substantially less than those associated with

---

[1953] Illinois Commission comments at Attachment C (Illinois Commerce Commission Docket No. 94.0096), pp.83-86, 98; Maryland Commission comments at Appendix B (Maryland Commission Order No. 72348, Case No. 8548 Phase II), pp.28-32.

[1954] *Ameritech Operating Companies Petition for Waiver of Part 69 of the Commission's Rules to Establish Unbundled Rate Elements for SS7 Signalling*, DA 96-446, Order, at para. 31 (Com. Car. Bur., rel. Mar. 27, 1996).

[1955] *Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge supplements for Open Network Architecture*, CC Docket Nos. 89-79 and 87-313, Report and Order, Order on Reconsideration, and Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 4524, 4531 (1991); *modified on recon.*, 7 FCC Rcd 5235 (1992); *Open Network Architecture Tariffs of Bell Operating Companies*, CC Docket No. 92-91, Order, 9 FCC Rcd 440, 454-456 (1993).

[1956] Interstate database services consist of Line Information Database (LIDB) and 800 Database. Deployment of SS7 (out-of-band signaling) has enabled LECs to offer these services. The average charge for RBOCs for LIDB in Density Zone 1 equals 3.34 cents ($0.034) per database query.

traditional service-based costs,[1957] allowing a reasonable allocation is sufficient to protect against possible anticompetitive pricing. Absent any proxy, this approach will provide the most reasonable approximation of forward-looking economic cost.

826. We have established rate structure rules for collocation elements in connection with our *Expanded Interconnection* proceeding.[1958] Many collocation elements established under section 251(c)(6) are likely to represent the same facilities, and should have the same cost characteristics, as existing interstate expanded interconnection services, and therefore we require states to use the same rate structure rules for those collocation elements that we established in the *Expanded Interconnection* proceeding. As a proxy ceiling, states may use the rates the LEC has in effect in its federal expanded interconnection tariff for the equivalent services. Expanded interconnection services are subject to the new services test, which, as discussed above, uses a forward-looking methodology. Although LECs have filed expanded interconnection tariffs, we have not yet completed our investigation into those tariffs. Any price for unbundled collocation elements set based on LEC expanded interconnection tariffs would therefore be subject to any modification of those tariffs that results from our pending investigation, and any state-imposed prices based on those tariffs will need to be adjusted accordingly.

827. We find it unnecessary to specify rate structures for other unbundled elements. The states shall make those determinations by applying our general rate structure principles described above. In the absence of an acceptable forward-looking cost study, states may establish default proxy ceilings for other unbundled elements by identifying the direct costs of providing the element and adding a reasonable allocation of joint and common costs.

[1957] *See supra*, Section VII.B.2.a.

[1958] *Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-141, 9 FCC Rcd 5154, 5186 (1994).

3. Forward-Looking Cost Model Proxies

a. Background and Comments

828. In the NPRM, we sought comment on the use of certain generic cost studies. Commenters discussed several such models. These models include: 1) the *Hatfield 2*;[1959] 2) the *Hatfield 2.2*;[1960] 3) the *BCM*;[1961] 4) the *BCM 2*;[1962] and 5) the *CPM*.[1963]

829. *Generic Cost Models.* Several generic forward-looking costing models were introduced into the record. Several commenters, supporting the use of generic cost models to establish the rates that incumbent LECs may charge for interconnection and unbundled elements, claim that such an approach would result in ceilings that are efficient, objective, and based on non-proprietary inputs.[1964] On the other hand, certain commenters argue that generic cost models should not be used as proxies because they fail to reflect the possible differences in costs among states, and among carriers, due to technical, demographic, and geographic factors.[1965] In addition, many parties also discussed the use of proxies as direct substitutes for the prices of interconnection and unbundled network element rates.[1966]

[1959] *The Cost of Basic Network Elements: Theory, Modeling, and Policy Implications* (Hatfield Associates, Inc., March 1996), submitted by MCI on March 29, 1996 (*Hatfield 2*).

[1960] *Hatfield Model, Version 2.2, Release 1*, (Hatfield Associates, Inc., March 1996), submitted by AT&T and MCI on May 16, 1996 (*Hatfield 2.2*); *see also* AT&T reply at Appendix D (Update of the Hatfield Model Version 2.2, Release 1).

[1961] *Benchmark Cost Model: A Joint Submission by MCI Communications, Inc., NYNEX Corporation, Sprint Corporation, U S West, Inc.* (December 1995), submitted by MCI Communications, Inc., NYNEX Corp., Sprint/United Management Corp., U S West, Inc. on July 24, 1996 (*BCM*).

[1962] *Benchmark Cost Model 2* (July 1996), submitted by Sprint Corp. and U S West, Inc., on July 24, 1996 (*BCM 2*).

[1963] *The Cost Proxy Model* (INDETEC International, 1996), submitted by Pacific Telesis Group on June 7, 1996 (*CPM*).

[1964] *See, e.g.*, Ad Hoc Telecommunications Users Committee comments at 50; PacTel comments at 76; Ohio Consumers' Counsel comments at 28-29.

[1965] *See, e.g.*, Bay Springs, *et al.* comments at 16-17; Cincinnati Bell comments at 28; Florida Commission comments at 30; Telecommunications Resellers Ass'n comments at 41; California Commission reply at 19.

[1966] *See, e.g.*, AT&T comments at 53.

830. *The Hatfield Models.*[1967] Parties also commented on the particular generic cost models placed on the record in this proceeding, and several support the use of a version of the *Hatfield* model.[1968] These parties argue that the *Hatfield* model represents the only comprehensive nationwide analysis of virtually all network elements on a highly disaggregated basis and is the ideal standard for the Commission to adopt because it will provide immediate certainty on pricing.[1969] Other commenters oppose the application of a version of the *Hatfield* model,[1970] asserting that it may not accurately reflect an incumbent LEC's decisionmaking process for determining the economic and technical feasibility of interconnection because it assumes building "from scratch," an assumption potentially leading to inaccuracy.[1971] Critics of the various *Hatfield* models also argue that they results in below-cost rates for services,[1972] do not capture embedded costs,[1973] and employ a nationwide industry average for costs when costs should be based on the particular carrier's costs.[1974]

831. GTE argues that the *Hatfield 2.2* model's assumptions and analytic practices result in an understatement of cost per loop of about $8.00.[1975] GTE criticizes the assumption that all traffic carried by LECs will be served by a brand new entrant that instantly materializes. GTE indicates that such an assumption would not produce results that are representative of incumbent

---

[1967] We note that many parties did not address their comments to a particular version of the *Hatfield* model. In such cases, we will refer generally to the *Hatfield* model.

[1968] *See, e.g.*, ACSI comments at 56; AT&T comments at 53 (commenting on *Hatfield 2.2*); MCI comments at 68-69 (commenting on *Hatfield 2*); NEXTLINK comments at 27-28; Washington Commission comments at 27.

[1969] *See, e.g.*, MCI comments at 69 (commenting on *Hatfield 2*).

[1970] *See, e.g.*, PacTel comments at 74-76, reply at 30 (commenting on *Hatfield 2.2*); Ohio Consumers' Counsel comments at 29 n.10; USTA comments at 54 n.45; Sprint reply at 31-32; Rural Tel. Coalition reply at 35.

[1971] *See, e.g.*, Florida Commission comments at 28-29; Lincoln Tel. reply at 6; Rural Tel. Coalition reply at 35; USTA comments at 47-48, 54 n.45.

[1972] *See, e.g.*, Lincoln Tel. reply at 6; U S West comments 20-22.

[1973] *See, e.g.*, USTA comments at 54 n.45; Rural Tel. Coalition reply at 35; PacTel reply at 30 (commenting on *Hatfield 2.2*).

[1974] *See, e.g.*, GVNW reply at 12-13; Lincoln Tel. reply at 6; Sprint reply at 28-32.

[1975] Letter from Whitney Hatch, Assistant Vice President Regulatory Affairs, GTE, to William F. Caton, Acting Secretary, FCC, July 11, 1996 at Attachment 2 (Economic Evaluation of Version 2.2 of the Hatfield Model).

LEC costs when providing services and unbundled elements. GTE argues that the *Hatfield 2.2* model's use of multiplicative factors to calculate installation costs produces inaccuracies, to the extent that the basis of these factors depart from historical relationships. In addition, GTE asserts that the equipment prices used in the *Hatfield 2.2* model are consistently lower than prices paid by LECs. Moreover, GTE asserts that the capital cost and depreciation rates of the *Hatfield 2.2* model do not reflect costs of capital and depreciation rates that will prevail under competitive conditions.[1976] Finally, it asserts that the *Hatfield 2.2* model uses unrealistically high fill factors (the percentage of capacity used), which results in an understatement of investment and, hence, annualized cost.[1977]

832. *The Benchmark Cost Models.*[1978] Although some parties support the use of the *BCM* to set rates for interconnection and unbundled elements,[1979] many other parties oppose its use for this purpose.[1980] Several commenters argue that, because the *BCM* was designed to identify only high cost areas, its assumptions are flawed and will fail to reflect small and rural LECs' network characteristics.[1981] NYNEX argues that the *BCM* is based on a limited set of assumptions about the costs that affect loops.[1982] Commenters further contend that the *BCM* is not technology neutral,[1983] is not designed to estimate the costs of serving business customers,[1984] assumes one

---

[1976] *Id.* at 13-16.

[1977] *Id.* at 9-12.

[1978] We note that many parties did not address their comments to a particular version of the *BCM*. In such cases, we will refer generally to the *BCM*.

[1979] *See, e.g.*, ACSI comments at 56; Sprint comments at 54 n.30; Texas Public Utility Counsel comments at 29.

[1980] *See, e.g.*, Florida Commission comments at 29-30; GVNW comments at 38-39; NYNEX comments at 57; Ohio Consumers' Counsel comments at 29, n.10; PacTel comments at 74-76; SBC comments at 92-93; TDS comments at 22; Rural Tel Coalition comment at 22, reply at 34-35.

[1981] *See, e.g.*, Rural Tel. Coalition comments at 22; TDS comments at 22; *see also* Time Warner comments at 54-55; USTA comments at 54 n.45.

[1982] NYNEX comments at 57; *see also* SBC comments at 92-93.

[1983] *See, e.g.*, WinStar comments at 34; Texas Statewide Tel. Cooperative, Inc. comments at 14.

[1984] *See, e.g.*, NYNEX comments at 57.

type of central office switch,[1985] and uses
ARMIS cost loading factors that assume that costs are spread over the existing, larger investment base.[1986]

833. *Cost Proxy Model (CPM).* Pacific Telesis maintains that its *CPM* is a superior alternative to the *Hatfield* models and *BCM* models because it is more flexible, can be based on non-proprietary information, can be independently audited, can estimate the cost of providing local telephone service for one-fourth (1/4) mile grids or large geographic areas, and reflects the actual locale of subscribers within a census block.[1987]

b. Discussion

834. We believe that the generic forward-looking costing models, in principle, appear best to comport with the preferred economic cost approach discussed previously. Several such models were placed in the record, including *Hatfield 2*, *Hatfield 2.2*, *BCM*, *BCM 2*, and the *CPM*. The *BCM* is designed to produce "benchmark" costs for the provision of basic telephone service within specific geographic regions defined by the Bureau of the Census as Census Block Groups. The *Hatfield 2* model combines output from the *BCM* with independently-developed investment data to produce annual cost estimates for eleven basic network functions. The *CPM* is similar in structure to the *BCM* and *Hatfield 2* models, although it uses different algorithms.

835. These models appear to offer a method of estimating the cost of network elements on a forward-looking basis that is practical to implement and that allows state commissions the ability to examine the assumptions and parameters that go into the cost estimates. Although these models were submitted too late in this proceeding for the Commission and parties to evaluate them fully, our initial examination leads us to believe that the remaining practical and empirical issues can be resolved in the near future. In light of the advantages of such a generic approach, we will further examine these generic economic cost models by the first quarter of 1997 to determine whether we should use one of them to replace the default proxies we adopt in this proceeding. In that event, states would have the option of setting rates in arbitrations on the basis of an economic cost study or by using a generic forward-looking cost model approved at that time.[1988]

[1985] *Id.*

[1986] *Id.*

[1987] PacTel comments at 76.

[1988] We note that we address certain criticisms of the models in the context of their use in the development of the proxy for the unbundled local loop, *supra*, Section VII.C.2.b.(1)(b).

836. Finally, we note that Commission staff developed a model of the telecommunications industry that they designed to simulate industry demand and supply characteristics.[1989] In order to encourage an open-ended discussion of the utility of the staff model, the Common Carrier Bureau sought comment on a working draft of the model that was released. Almost all parties commenting on the staff model urged the Commission not to rely upon the staff model as record evidence in this proceeding.[1990] We are not relying on the staff model to develop the requirements imposed by this Order.

D. Other Issues

1. Future Adjustments to Interconnection and Unbundled Element Rate Levels

a. Background and Comments

837. In the NPRM, we sought comment on whether some cost index or price cap system would be appropriate to ensure that rates reflect expected changes in costs over time.[1991] Only two parties commented on this issue, and neither supported establishment of a price cap system or other index system to adjust rates over time. MCI claims that it is not necessary to recompute TSLRIC costs each year. It argues that large productivity factors are not needed as they are in price cap system, because initial access rates were based on embedded costs, which greatly exceed economic costs. MCI proposes that the Commission should use initial rates as ceilings for a three to five year period. It contends that, if competition develops satisfactorily, there may not be a need to revisit the costing process. On the other hand, MCI suggests that if it appears that LECs retain substantial market power, a performance review could become necessary.[1992] Ad Hoc Telecommunications Users Committee notes that the success of any price cap plan would depend on the accuracy of the productivity offset. It states that an inappropriately low productivity offset could result in excessive charges.[1993]

[1989] *See* Public Notice, *Supplemental Comment Period Designated for Local Competition Proceeding*, CC Docket 96-98, DA 96-1007 (rel. June 20, 1996). The comment period was extended subsequently to July 8, 1996. *See* Public Notice, *Supplemental Comment Period Extended for Local Competition Proceeding*, CC Docket 96-98, DA 96-1030 (rel. June 25, 1996). The Commission did not authorize reply comments.

[1990] *See, e.g.*, Ameritech July 8 comments at 14; NCTA July 8 comments at 2; PacTel July 8 comments at 21; *see also* New York Commission July 8 comments at 1-2 (Commission should institute "collaborative process" whereby federal, state, and industry participants can review model and develop alternatives).

[1991] NPRM at para. 133.

[1992] MCI comments at 68.

[1993] Ad Hoc Telecommunications Users Committee comments at 31.

b. Discussion

838. As noted earlier, we will continue to review our pricing methodology, and will make revisions as appropriate. Accordingly, there is no present need to establish a Commission price cap or cost index system to adjust interconnection and unbundled element rate levels.

2. Imputation

a. Background

839. We sought comment in the NPRM on whether we should require an "imputation rule" in establishing rates for unbundled network elements.[1994] An imputation rule would require that the sum of prices charged for a basket of unbundled network elements not exceed the retail price for a service offered using the same basket of elements. We further solicited comment on any other rules that could be adopted regarding pricing of unbundled network elements that would help to promote the pro-competitive goals of the 1996 Act.

b. Comments

840. Commenters favoring an imputation rule, including some IXCs and other potential entrants, and one state utility counsel, argue that imputation is necessary to prevent potential anticompetitive practices highlighted in the NPRM, such as price squeezes and predatory pricing by incumbent LECs.[1995] Several commenters also endorsed imputation as a method of testing whether rates are reasonable.[1996] Sprint argues that, unless the Commission imposes an imputation rule, incumbent LECs will have little incentive to pursue rate rebalancing activities vigorously before state commissions.[1997] Teleport urges the Commission not to assume that new entrants possess sufficient financial resources to survive a price squeeze and suggests that, if a carrier fails an imputation test, the Commission should find that the market is not sufficiently competitive to

---

[1994] NPRM at para. 184.

[1995] *See e.g.*, ACSI comments at 56-57; ACTA comments at 26; Frontier comments at 29-30; NEXTLINK comments at 33; Telecommunications Resellers Ass'n comments at 26; Teleport comments at 60-63; Texas Public Utility Counsel comments at 47-48. MCI comments at Attachment 1 (The Cost of Basic Network Elements: Theory, Modeling and Policy Implications), pp.6-7 (arguing that imputation is necessary, but not sufficient, to prevent price squeezes).

[1996] *See, e.g.*, Intermedia Comments at 14; Sprint Comments at 72-74.

[1997] Sprint reply at 44.

allow incumbent BOC entry into the in-region long distance market.[1998]

841. Among new entrants, Time Warner believes an imputation rule is unnecessary because unbundled element rates will not exceed retail rates in most cases.[1999] It asserts that the Commission should not adopt an imputation rule during the transition period prior to the enactment of universal service reform, and that it is unlikely that competing providers will ignore competitive forces and uniformly retain non-competitive margins in order to support residential rates below TSLRIC.[2000]

842. Several commenters express the view that imputation issues should be left for decision by the states.[2001] A number of state utility commissions that employ an imputation rule in their states endorse imputation as a way to prevent price squeezes, but either take no position on, or oppose, Commission adoption of imputation as a national standard.[2002] The Michigan Commission Staff believes that states should have flexibility to address imputation issues on their own, a process that has already begun in Michigan.[2003] The Washington Commission states that, although it has employed imputation as a method of ensuring that customers of monopoly services do not subsidize other more competitive services, the "threat" posed by below-cost rates generally has been overstated.[2004]

843. The National Association of State Utility Consumer Advocates and the Competition Policy Institute argue that the Commission lacks power to act in this area because of the intrastate/interstate jurisdictional divide established by section 152(b) of the Communications Act

---

[1998] Teleport comments at 60-63.

[1999] Time Warner comments at 83.

[2000] *Id.* at 84-85

[2001] *See, e.g.*, Alabama Commission comments at 28; Florida Commission comments at 38 (no need for federal imputation rule if each state may implement unbundled element pricing rules that cover costs); Wyoming Commission comments at 36.

[2002] *See, e.g.*, Colorado Commission comments at 56-57 (opposing a national imputation rule); Washington Commission comments at 35 (questioning the need for preemption order that would require that local service rates exceed costs); Illinois Commission comments at 56-58 (urging the Commission not to prohibit states from adopting imputation rules, but taking no position on the need for a national imputation rule pending further study by the federal-state joint board).

[2003] Michigan Commission Staff comments at 16-17.

[2004] Washington Commission comments at 36.

of 1934.[2005]

844. Responding to the concern, expressed in the NPRM, about requiring imputation for below-cost services, the Texas Commission observes that Texas law will permit waiver of its imputation rule in certain cases.[2006] Frontier states that in the case of subsidized services a limited offset could be applied to reflect the subsidy, but only in the uncommon case in which the incumbent LEC can affirmatively prove that the affected class of service is priced below its forward-looking incremental cost.[2007]

845. Joint Consumer Advocates and the Ohio Commission suggest that adoption of an imputation rule is unnecessary because both the incumbent LEC and the new entrant will face the same burdens in providing below cost service, and each may recover their costs through other revenue sources, such as federal and state universal service funds.[2008] Joint Consumer Advocates and Ohio Consumers' Counsel take issue with the assumption that local service is subsidized, and argue imputation is unnecessary because retail rates are not significantly below cost.[2009] They assert that since other services, such as toll, also use the local loop, it is improper to load all of the costs of the local loop onto local service.[2010]

846. Several commenters voice concerns that an imputation rule would be difficult to implement in rural areas.[2011] The Minnesota Independent Coalition states that imputation could lead to increases in local rates for rural service, in contravention of the 1996 Act's universal service requirements of preserving rates in rural areas that are reasonably comparable to rates charged for similar services in urban areas, and the universal service policy requirements of

---

[2005] Competition Policy Institute comments at 13; Natl. Ass'n of State Util. Consumer Advocates comments at 5-8; Joint Consumer Advocates reply at 14.

[2006] Texas Commission comments at 29-30, Attachment II (Public Util. Regulatory Act of 1995, Tex. Rev. Civ. Stat. Ann., Art. 1446(c)) (Texas law requires the Texas Commission to adopt imputation rules by December 1, 1996).

[2007] Frontier comments at 29-30.

[2008] Joint Consumer Advocates reply at 15-16; Ohio Commission comments at 67.

[2009] Joint Consumer Advocates reply at 14-16; Ohio Consumers' Counsel comments at 38-40.

[2010] *Id.*

[2011] *See, e.g.*, TCA Comments at 8.

254(b).[2012]

847. Incumbent LECs also oppose imputation, claiming that it would create opportunities for arbitrage,[2013] fail to reflect the costs of unbundling incumbent LEC networks,[2014] put pressure on states to raise retail rates,[2015] create a de facto ceiling preventing incumbent LECs from recovering their costs,[2016] and constitute an unconstitutional taking of incumbent LEC revenues.[2017] NYNEX and BellSouth also assert that restrictions on cost recovery are inconsistent with the 1996 Act's requirement that unbundled element rates be based on costs.[2018] According to USTA and Ameritech, an imputation rule may cause incumbent LECs to subsidize new entrants, and lead to inefficient entry.[2019] BellSouth argues that intrastate retail prices are based on factors other than cost, such as the policies of the state commission that approved the charges, and that an imputation rule would interfere with the states' exclusive ratemaking authority over intrastate rates and charges. According to BellSouth, Congress did not establish any requirement or expectation that these pricing standards would yield charges that would bear any particular relationship to one another, and BellSouth asserts there is no reason to expect the sum of unbundled element prices to add up to the retail rate any more than one would expect that the individual parts of an automobile could be obtained for less than the price of an already-assembled car. [2020]

[2012] Minn. Ind. Coalition comments at 31, 33; *see also* Western Alliance comments at 3-4 (Commission should not adopt an imputation rule until other, explicit mechanisms are in place to ensure the statutory goal of reasonable parity of urban and rural rates).

[2013] *E.g.*, USTA comments at 75.

[2014] *See, e.g.*, Ameritech comments at 83-84 (rejecting a "sum-of-the-parts" test for unbundled element pricing, and arguing that an imputation rule must make allowance for costs of unbundling the network); GTE comments at 64-65.

[2015] *E.g.*, USTA comments at 77.

[2016] *E.g.*, NYNEX comments at 60 (asserting that such a price ceiling conflicts with the 1996 Act).

[2017] *See, e.g.*, NYNEX comments at 60-61; USTA comments at 77, reply at 31.

[2018] BellSouth reply at 42; NYNEX comments at 61.

[2019] Ameritech comments at 84; USTA comments at 77.

[2020] BellSouth comments at 68; *see also* US Network Services comments at 5-6.

c. Discussion

848. Although we recognize, as several commenters observe, that an imputation rule could help detect and prevent price squeezes, we decline to impose an imputation requirement. Adoption of an imputation rule could force states to engage in a major rate rebalancing effort at this time, because it would impose substantial additional burdens on states at a time when they will need to devote significant resources to implementing the 1996 Act.

849. In addition to our practical concerns regarding implementation of an imputation rule, we find that an imputation rule may not be necessary to achieve the pro-competitive goals of the 1996 Act. As some commenters, including several state commissions, suggest, competing providers may be able to provide basic service, at less than the cost of facilities and associated management, just as incumbent LECs do currently, by selling customers higher profit vertical or intrastate toll services, or through receipt of access revenues and subsidies. Further, the Ohio Consumers' Counsel suggest that below-cost rates may not be sufficiently prevalent to justify a national imputation rule.[2021] The Joint Consumer Advocates and the Ohio Consumers' Counsel question whether local service is, in fact, underpriced.[2022]

850. We give special weight to the comments of several state commissions that currently employ imputation rules.[2023] These state commissions endorse imputation as a tool to prevent price squeezes, but urge us only to provide states with the flexibility to adopt imputation rules. We agree with those state commission commenters that argue that nothing in the 1996 Act prohibits individual states from adopting imputation rules. While an imputation rule may be pro-competitive, we will leave the implementation of such rules to individual states for the time being.

[2021] Ohio Consumers' Counsel comments at 39.

[2022] Joint Consumer Advocates reply at 16; Ohio Consumers' Counsel comments at 39.

[2023] *See, e.g.*, Colorado Commission comments at 56-57; Illinois Commission comments at 57-58; Michigan Commission Staff comments at 16-17; Washington Commission comments at 35.

3. Discrimination

a. Background

851. In the NPRM, we noted the different usages of the term "discrimination" in the 1996 Act and the 1934 Act.[2024] Sections 251 and 252 require that interconnection and unbundled element rates be "nondiscriminatory."[2025] Similarly, section 251(c)(4) requires that, in making resale available, carriers not impose "discriminatory conditions or limitations on resale."[2026] Finally, section 252(e) provides that states may reject a negotiated agreement or a portion of the agreement if it "discriminates" against a carrier not a party to the agreement and section 252(i) requires incumbent LECs to "make available any interconnection, service, or network element provided under an agreement . . . to which it is a party to any requesting telecommunications carrier upon the same terms and conditions."[2027] In contrast, section 202(a) of the 1934 Act provides that "(i)t shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges . . . for . . . like communication service."[2028]

852. We sought comment on "the meaning of the term 'nondiscriminatory' in the 1996 Act compared with the phrase 'unreasonable discrimination' in the 1934 Act." We asked specifically whether Congress intended to prohibit all price discrimination, including measures such as density zone pricing or volume and term discounts, by choosing the word "nondiscriminatory." We further asked whether sections 251 and 252 could be interpreted to prohibit only unjust or unreasonable discrimination. Finally, we sought comment on whether the 1996 Act prohibited carriers from charging different rates to parties that are not similarly situated.[2029]

[2024] NPRM at para. 155.

[2025] 47 U.S.C. §§ 251(c)(2), (3), (6), and 252(d)(1).

[2026] 47 U.S.C. § 251(c)(4)(B). *See infra*, Section VIII.C..

[2027] 47 U.S.C. §§ 252(e), (i).

[2028] 47 U.S.C. § 202(a).

[2029] NPRM at para. 156.

b. Comments

853. Many state regulatory commissions, several incumbent LECs, and USTA maintain that the term "nondiscriminatory" used in the 1996 Act is synonymous with the prohibition of "unjust and unreasonable discrimination" used in the 1934 Act.[2030] Generally, these parties agree that pricing variations are only discriminatory when the affected parties are similarly situated. They argue that a blanket prohibition on all price differences, even when justified by costs, would be anti-competitive and would appear to defeat the process of negotiation. The Ohio Commission argues that smaller companies, not similarly situated to the larger telephone companies already in operation, need different treatment in order to compete.[2031] Finally, they contend that Congress did not intend to prohibit reasonably supported plans, such as volume and term discounts. The Pennsylvania Commission argues that, if Congress had intended to prohibit cost-based price differences, it would have included interconnection and unbundled elements in the prohibition against geographic price differences for toll rates, which is contained in Section 254(g).[2032] Pacific Telesis argues that different prices are permissible under the "nondiscriminatory" standard wherever incremental costs decline as output increases.[2033]

854. Other commenters, including MCI and MFS, assert that the term "nondiscriminatory" in the 1996 Act must be interpreted to have a more stringent meaning than the phrase "unjust and unreasonable discrimination" used in the 1934 Act.[2034] Several parties suggest that since the conferees considered and rejected a version of section 251 that applied an "unreasonably discriminatory" standard to the actions of incumbent LECs, the change in wording was purposeful.[2035] Generally, these parties argue that although the "nondiscriminatory" standard

---

[2030] *See, e.g.*, Alabama Commission comments at 23; BellSouth comments at 58; California Commission comments at 31-33; Colorado Commission comments at 48; District of Columbia Commission comments at 25; Illinois Commission comments at 47; Indiana Commission comments at 25; MECA comments at 55-56; Ohio Commission comments at 51; PacTel comments at 76-77; USTA comments at 57-58.

[2031] Ohio Commission comments at 53.

[2032] Pennsylvania Commission comments at 32.

[2033] PacTel comments at 77; *but see* AT&T reply at 35.

[2034] *See, e.g.*, MCI comments at 71; MFS comments at 63; ALTS reply at 40.

[2035] NCTA comments at 31 n.114 (*citing* S. 652, 104th Cong. 1st Sess. § 101 (deleting Section 251(c)(2)(C)) (Draft, Nov. 27, 1995)); *see also* MFS comments at 63.

is more stringent, cost-based price differences are nonetheless permissible under the 1996 Act.[2036] The Independent Cable & Telecommunications Association contends that the only way to prevent incumbent LECs from discriminating against smaller companies and new entrants is to prohibit all non-cost based price differences.[2037] LDDS argues that only cost-based price differentials should be permitted, and that any non-cost-based volume discount should be prohibited, even if arrived at through agreement of the parties.[2038]

855. A third group of commenters argue for a strict reading of the term "nondiscriminatory."[2039] They argue that the plain meaning of the term "nondiscriminatory" without qualification demonstrates that under section 251 even reasonable discrimination is impermissible.[2040] R. Koch contends that if there is *any* discrimination, small entrants will be at a disadvantage.[2041] Finally, they maintain that the higher standard reflects the distinction between the carrier-user relationship being regulated in section 202(a) and the intercarrier relationship addressed in section 251(c).[2042]

856. CMRS providers argue that some state regulations treat CMRS providers differently than wireline new entrants with respect to the rates for interconnection with incumbent LECs. AT&T Wireless contends that the New York and Connecticut Commissions require incumbent LECs to charge two distinct interconnection rates depending on whether the carrier is classified as a CMRS provider or competing provider of local exchange service.[2043] According to AT&T Wireless, in New York, the wireline competitive LEC rate for termination of traffic on the incumbent LEC network is less than one cent per minute and the CMRS provider rate is

---

[2036] *See, e.g.*, MCI comments at 71-72; MFS comments at 64; Michigan Commission comments at 18; Municipal Utilities comments at 14-15; Pennsylvania Commission comments at 32; Sprint comments at 64-65.

[2037] Ind. Cable & Telecomm. Ass'n reply at 11-12.

[2038] LDDS reply at 40-41.

[2039] *See, e.g.*, AT&T comments at 68-69; NCTA comments at 31 (section 251(c) requires strict scrutiny of any discrimination, not solely unreasonable discrimination); WinStar comments at 7.

[2040] *See, e.g.*, WinStar comments at 7.

[2041] *See, e.g.*, R. Koch comments at 3.

[2042] NCTA comments at 31.

[2043] Letter from Cathleen A. Massey, AT&T Wireless Services, to William F. Caton, Acting Secretary, FCC, July 2, 1996, filed in CC Docket Nos. 95-185 and 96-98, at 1-3 (*AT&T July 2, 1996 Ex Parte*).

approximately 2.6 cents ($0.026) per minute.[2044] AT&T Wireless further contends that, in order to obtain the lower rate, a CMRS provider in New York must comply with state regulations, such as universal service obligations associated with residential and Lifeline service.[2045] Bell Atlantic NYNEX Mobile submits that in Connecticut, the rate for wireline new entrants' termination of traffic on the incumbent LEC network is less than one cent ($0.01) per minute and the CMRS provider rate is 4.14 cents ($0.0414) per minute.[2046] AT&T Wireless states that California has ordered incumbent LECs to implement interim bill-and-keep compensation for interconnection for wireline entrants' interconnection but not for CMRS providers' interconnection,[2047] and Florida has ruled that no compensation shall be paid to mobile carriers by incumbent LECs for land-originated calls.[2048]

857. In addition to their assertion regarding rate discrimination, CMRS providers maintain that state commissions permit incumbent LECs to treat CMRS providers in a discriminatory manner with respect to the terms and conditions of interconnection.[2049] Bell Atlantic NYNEX Mobile states that in Connecticut, Maryland, New York and Texas, the rates paid by Bell Atlantic NYNEX Mobile to the connecting LEC to terminate calls originated on Bell Atlantic NYNEX Mobile's network are more than twice the rates paid by competing wireline LECs to incumbent LECs.[2050] Bell Atlantic NYNEX Mobile also states that "these disparities have no rational cost

---

[2044] *Id.*

[2045] *See Order Instituting Framework for Directory Listings, Carrier Interconnection and Carrier Compensation,* New York Public Service Commission, CASE 94-C-0095 (New York Commission, September 27, 1996) at 15.

[2046] Bell Atlantic NYNEX Mobile comments in CC Docket No. 95-185, at Exhibit A.

[2047] *Competition For Local Exchange Service*, Decision 95-07-054, Appendix A, para. 7 (California Commission, July 24, 1995).

[2048] *See Investigation Into the Rates For Interconnection of Mobile Service Providers With Facilities of Local Exchange Companies*, Docket No. 940235-TL, slip op. at 24 (Florida Commission, Oct. 11, 1995).

[2049] AT&T comments in CC Docket No. 95-185, at 27; AirTouch Communications comments in CC Docket No. 95-185, at 33; Bell Atlantic NYNEX Mobile comments in CC Docket 95-185, at 5-6; Comcast Corporation comments in CC Docket No. 95-185, at 6-7; New Par comments in CC Docket No. 95-185, at 4-5.

[2050] Bell Atlantic NYNEX Mobile comments in CC Docket No. 95-185, at Exhibit A, p.5. Bell Atlantic NYNEX Mobile's Exhibit A shows that LEC charges to competitive providers on an average rate per minute are considerably less than those to CMRS carriers: In Connecticut, Bell Atlantic NYNEX Mobile pays 4.14 cents/min. ($0.0414) to terminate local traffic on a LEC network while competitive providers pay 0.8 cents/min. ($0.008); in Maryland, Bell Atlantic NYNEX Mobile pays 2.27 cents/min. ($0.0227) to terminate local traffic on a LEC network, while competitive providers pay 0.5 cents/min. ($0.005); in New York, Bell Atlantic NYNEX

basis since an incumbent LEC's costs to complete a call received from Bell Atlantic NYNEX Mobile should be no higher than its costs to complete calls received from other carriers."[2051] Similarly, APC states that its interconnection agreements with Bell Atlantic, which are identical in Maryland, Virginia, West Virginia, and District of Columbia, artificially inflate its costs by at least 3.1 cents ($0.031) per minute.[2052]

858. Western Wireless also provides examples of discriminatory interconnection rates by LECs.[2053] Western Wireless states that it has been unable to reach an agreement with any incumbent LECs in its wireless service area that is based on cost or that provides reciprocal compensation.[2054] AT&T Wireless contends that states regularly permit LECs to charge wireless carriers significantly higher rates than competing LECs for intrastate interconnection.[2055] CTIA cites LEC-LEC interconnection agreements in 18 states that provide for rates much below the approximate nationwide average incumbent LEC-CMRS interconnection rate of three cents ($0.03) per minute.[2056]

Mobile pays 2.59 cents/min. ($0.0259) to terminate local traffic on a LEC network, while competitive providers pay only 0.98 cents/min.; and in Texas, Bell Atlantic NYNEX Mobile pays 1.7 cents/min. ($0.017) to terminate local traffic on a LEC network, while competitive providers pay zero cents/min. ($0.0). *Id.*

[2051] *Id.* at 5-6.

[2052] APC comments in CC Docket No. 95-185 at 5-6 (alleging it pays Bell Atlantic a monthly $25 per trunk surcharge between its mobile switching center and Bell Atlantic's tandem, a usage-sensitive charge for transport and switching elements, and $800 a month for termination for SS7 connectivity, while Bell Atlantic pays APC nothing in return).

[2053] Letter from Doane F. Kiechel, counsel to Western Wireless Corporation, to William F. Caton, Acting Secretary, FCC, July 5, 1996, in CC Docket No. 96-98.

[2054] *Id.* at 4.

[2055] *AT&T July 2, 1996 Ex Parte* at 3.

[2056] Letter from Randall S. Coleman, CTIA, to Michele Farquhar, Chief, Wireless Telecommunications Bureau, FCC, July 2, 1996, in CC Docket Nos. 95-185 and 96-98, at Attachments.

c. Discussion

859. We conclude that the term "nondiscriminatory" in the 1996 Act is not synonymous with "unjust and unreasonable discrimination" in section 202(a), but rather is a more stringent standard.[2057] Finding otherwise would fail to give meaning to Congress's decision to use different language. We agree, however, with those parties that argue that cost-based differences in rates are permissible under sections 251 and 252.

860. Section 252(d)(1), for example, requires carriers to base interconnection and network element charges on costs. Where costs differ, rate differences that accurately reflect those differences are not discriminatory. This is consistent with the economic definition of price discrimination, which is "the practice of selling the same product at two or more prices where the price differences do not reflect cost differences . . . An important feature of the economic definition of price discrimination is that it occurs not only when prices are different in the presence of similar costs but also *when the prices are the same and the costs of supplying customers are different.*" [2058] As one economist has recognized, differential pricing is "one of the most prevalent forms of marketing practices" of competitive enterprises.[2059] Strict application of the term "nondiscriminatory" as urged by those commenters who argue that prices must be uniform would itself be discriminatory according to the economic definition of price discrimination. If the 1996 Act is read to allow no price distinctions between companies that impose very different interconnection costs on LECs, competition for all competitors, including small companies, could be impaired. Thus, we find that price differences, such as volume and term discounts, when based upon legitimate variations in costs are permissible under the 1996 Act, if justified.

861. On the other hand, price differences based not on cost differences but on such considerations as competitive relationships, the technology used by the requesting carrier, the nature of the service the requesting carrier provides, or other factors not reflecting costs, the requirements of the Act, or applicable rules, would be discriminatory and not permissible under the new standard. Such examples include the imposition of different rates, terms and conditions based on the fact that the competing provider does or does not compete with the incumbent LEC, or offers service via wireless rather than wireline facilities. We find that it would be unlawfully discriminatory, in violation of sections 251 and 252, if an incumbent LEC were to charge one

---

[2057] *See supra*, Section IV.G, discussing nondiscriminatory terms and conditions for interconnection, and *supra*, Section V.G., discussing nondiscriminatory terms and conditions for unbundled network elements.

[2058] David L. Kaserman & John W. Mayo, Government & Business: *The Economics of Antitrust & Regulation* at 273-74 (1995) (*citing* George J. Stigler, *The Theory of Price* (3d ed. 1966)) (emphasis added).

[2059] Hal R. Varian, "Price Discrimination," in *Handbook of Industrial Organization*, vol.1, p. 598 (R. Schmalensee and R.D. Willig eds., 1989).

class of interconnecting carriers, such as CMRS providers, higher rates for interconnection than it charges other carriers, unless the different rates could be justified by differences in the costs incurred by the incumbent LEC.

862. State regulations permitting non-cost based discriminatory treatment are prohibited by the 1996 Act. This conclusion is consistent with both the letter and the spirit of the 1996 Act and our determination that the pricing for interconnection, unbundled elements, and transport and termination of traffic should not vary based on the identity or classification of the interconnector.[2060]

[2060] *See infra*, Section XI.A., discussing transport and termination rates.

VIII. RESALE

863. Section 251(c)(4) imposes a duty on incumbent LECs to offer certain services for resale at wholesale rates. Specifically, section 251(c)(4) requires an incumbent LEC:

> (A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and
>
> (B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.[2061]

864. The requirement that incumbent LECs offer services at wholesale rates is described in section 252(d)(3), which sets forth the pricing standard that states must use in arbitrating agreements and reviewing rates under BOC statements of generally available terms and conditions:

> [A] State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

Section VIII.A. of this Order discusses the scope of section 251(c)(4). Section VIII.B. addresses the determination of "wholesale rates." Section VIII.C. considers the issue of conditions or limitations on resale under this section, Section VIII.D. discusses the resale obligations under section 251(b)(1), and Section VIII.E. considers the application of access charges in the resale environment.

[2061] 47 U.S.C. § 251(c)(4).

A. Scope of Section 251(c)(4)

1. Background and Comments

865. In the NPRM, we sought comment generally on the scope of section 251(c)(4).[2062] AT&T and MCI request that the Commission adopt a minimum list of services that should be available for resale under section 251(c)(4).[2063] Cable & Wireless, the Telecommunications Resellers Association, and others argue for an expansive definition of "telecommunications services."[2064] For example, MCI argues that we should explicitly identify the following as telecommunications services that must be made available for resale: measured-rate business, flat-rate business, measured-rate residential, flat-rate residential; custom calling features (including all CLASS services); call blocking services; voice messaging; Integrated Services Digital Network (ISDN), Basic Rate Interface (BRI), and Primary Rate Interface (PRI); flat-rated and measured trunk services (including all types of PBX trunks); Automatic Number Identification (ANI) over T-1; data services; promotions, optional calling plans, special pricing plans; calling card, directory services, operator services; intraLATA toll; public access line service; semi-public coin telephone service; foreign exchange services; video dialtone; and Centrex and all feature packages.[2065]

866. Incumbent LECs on the other hand, argue for a much more limited set of services, primarily those generally thought of as basic telephone services.[2066] For example, SBC lists the following as examples of services that should be excluded: billing and collection; enhanced billing products; enhanced white page listings; inside wire; BDS/LAN; customer premises equipment; and information services.[2067]

867. Some commenters argue that parties seeking discounted telecommunications services for their own telephony needs should not be allowed to purchase services at wholesale prices. For example, Roseville Telephone argues that (1) requests for discounted resale services must come from carriers, not from end users; (2) a wholesale customer must resell 95 percent of the

---

[2062] NPRM at para. 173.

[2063] AT&T comments at 77 n.113; MCI comments at 84.

[2064] Cable & Wireless comments at 38-39; Telecommunications Resellers Ass'n comments at 18 n.47; AT&T comments at 76-78; MCI comments at 84.

[2065] MCI comments at 84.

[2066] *See, e.g.*, MECA comments at 60; NYNEX comments at 76-7; SBC reply at 13.

[2067] SBC comments at 67-68.

services it purchases at wholesale prices to unaffiliated companies; and (3) limits should be placed on how much of what wholesale service is sold to any one subscriber.[2068] Similarly, GTE argues that new entrants must resell service they purchase under section 251(c)(4) and not simply use such services for their own internal or administrative purposes.[2069] Cincinnati Bell requests that we explicitly state that resellers of incumbent LEC service must be telecommunications carriers.[2070] Conversely, AT&T opposes predicating the ability to purchase services at wholesale rates on the percentage of customers that purchase the resold service.[2071]

868. Some parties address the application of section 251(c)(4) to the services incumbent LECs sell to independent public payphone providers. The American Public Communications Council contends that independent public payphone providers are not "telecommunications carriers."[2072] The American Public Communications Council cites the definition in section 3(44) that excludes "aggregators," as defined in section 226[2073] and points out that we have previously found that independent public payphone providers are aggregators insofar as they exercise control over payphones.[2074] Thus, the American Public Communications Council argues, services sold to independent public payphone providers by incumbent LECs would be "telecommunications service[s] that [an incumbent LEC] provides at retail to subscribers who are not telecommunications carriers," thereby making such services subject to section 251(c)(4).[2075] The American Public Communications Council also argues that nothing in section 251 requires an entity purchasing services for resale to be a "telecommunications carrier."[2076] NYNEX argues that

[2068] Roseville Tel. comments at 3-5.

[2069] GTE comments at 47.

[2070] Cincinnati Bell comments at 31.

[2071] AT&T comments at 80 n.120.

[2072] American Public Communications Council comments at 2-3.

[2073] 47 U.S.C. § 153(44). Section 226(a)(2) defines "aggregator" as "any person that, in the ordinary course of its operations, makes telephones available to the public or to transient users of its premises, for interstate telephone calls using a provider of operator services. 47 U.S.C. § 226(a)(2).

[2074] American Public Communications Council comments at 2 (citing *Policies and Rules Concerning Operator Service Providers, Report and Order*, 6 FCC Rcd 2744 (1991), *recon.* 7 FCC Rcd 3882 (1992)).

[2075] American Public Communications Council at 3.

[2076] *Id.*

independent public payphone providers do not purchase these services for resale, but for their own use.[2077] Additionally, NYNEX argues, independent payphone providers do not interpose themselves between incumbent LECs and their existing retail customers, and thus do not enable incumbent LECs to avoid some portion of costs they incur in dealing with those customers.[2078] MFS argues that no resale relationship exists between an incumbent LEC and an independent public payphone provider.[2079]

869. Parties dispute whether specially-priced bundles of services must be offered for resale. SNET argues that LECs are not required to resell bundled services, as long as the services are all offered separately. SNET contends that requiring wholesale offerings of bundled services would deter competitive offerings by incumbent LECs.[2080] SBC argues that bundled services are not single services and therefore not subject to the resale provisions of the 1996 Act.[2081] The Telecommunications Resellers Association, TCC, LDDS, and MCI take the opposite position,[2082] noting that bundled items are often sold at prices well below the sum of their stand-alone prices.

870. The Telecommunications Resellers Association and Cable & Wireless argue that, where the incumbent LEC offers services only on a bundled basis, these services should be unbundled and offered separately, at wholesale rates.[2083] AT&T specifically argues that it should be allowed to purchase local exchange service without operator services.[2084] Pacific Telesis, NYNEX, and NCTA argue that incumbent LECs should not be subject to this requirement so long as the services are not offered to retail customers on a stand-alone basis.[2085] Bell Atlantic opposes AT&T's claim that Bell Atlantic should be required to provide local service without

---

[2077] NYNEX reply at 39.

[2078] *Id.*

[2079] MFS reply at 32.

[2080] SNET comments at 34.

[2081] *Id.* at 72-73.

[2082] Telecommunications Resellers Ass'n comments at 18; TCC comments at 44; LDDS comments at 83; MCI comments at 89.

[2083] *See, e.g.*, Telecommunications Resellers Ass'n comments at 19 n.49; Cable & Wireless comments at 48.

[2084] AT&T comments at 81 n.123.

[2085] PacTel comments at 87; NYNEX comments at 73; NCTA comments at 57.

operator services for resale.[2086]

2. Discussion

871. Section 251(c)(4)(A) imposes on all incumbent LECs the duty to offer for resale "any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers."[2087] We conclude that an incumbent LEC must establish a wholesale rate for each retail service that: (1) meets the statutory definition of a "telecommunications service;" and (2) is provided at retail to subscribers who are not "telecommunications carriers."[2088] We thus find no statutory basis for limiting the resale duty to basic telephone services, as some suggest.

872. We need not prescribe a minimum list of services that are subject to the resale requirement. State commissions, incumbent LECs, and resellers can determine the services that an incumbent LEC must provide at wholesale rates by examining that LEC's retail tariffs. The 1996 Act does not require an incumbent LEC to make a wholesale offering of any service that the incumbent LEC does not offer to retail customers. State commissions, however, may have the power to require incumbent LECs to offer specific intrastate services.[2089]

873. Exchange access services are not subject to the resale requirements of section 251(c)(4). The vast majority of purchasers of interstate access services are telecommunications carriers, not end users. It is true that incumbent LEC interstate access tariffs do not contain any limitation that prevents end users from buying these services, and that end users do occasionally purchase some access services, including special access,[2090] Feature Group A,[2091] and certain

---

[2086] Bell Atlantic reply at 25.

[2087] 47 U.S.C. § 251(c)(4)(A).

[2088] "Telecommunications service" is defined in section 3(46) to mean "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46) "Telecommunications" is, in turn, defined in section 3(43) as "the transmission, between or among points specified by the user, of information of the user's choosing without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43). "Telecommunications carrier" is defined in section 3(44) to mean "any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226)." 47 U.S.C. § 153(44).

[2089] *See, e.g.*, Illinois Public Utilities Act, Section 13-505.5.

[2090] End users may purchase special access from incumbent LECs in order to use high volume services offered by IXCs, such as AT&T's Megacom service.

Feature Group D elements for large private networks.[2092] Despite this fact, we conclude that the language and intent of section 251 clearly demonstrates that exchange access services should not be considered services an incumbent LEC "provides at retail to subscribers who are not telecommunications carriers" under section 251(c)(4). We note that virtually all commenters in this proceeding agree, or assume without stating, that exchange access services are not subject to the resale requirements of section 251(c)(4).[2093]

874. We find several compelling reasons to conclude that exchange access services should not be subject to resale requirements. First, these services are predominantly offered to, and taken by, IXCs, not end users. Part 69 of our rules defines these charges as "carrier's carrier charges,"[2094] and the specific part 69 rules that describe each interstate switched access element refer to charges assessed on "interexchange carriers" rather than end users.[2095] The mere fact that fundamentally non-retail services are offered pursuant to tariffs that do not restrict their availability, and that a small number of end users do purchase some of these services, does not alter the essential nature of the services. Moreover, because access services are designed for, and sold to, IXCs as an input component to the IXC's own retail services, LECs would not avoid any "retail" costs when offering these services at "wholesale" to those same IXCs. Congress clearly intended section 251(c)(4) to apply to services targeted to end user subscribers, because only those services would involve an appreciable level of avoided costs that could be used to generate a wholesale rate. Furthermore, as explained in the following paragraph, section 251(c)(4) does not entitle subscribers to obtain services at wholesale rates for their own use. Permitting IXCs to purchase access services at wholesale rates for their own use would be inconsistent with this requirement.

875. We conclude that section 251(c)(4) does not require incumbent LECs to make

---

[2091] Feature Group A is similar to a local exchange service, but is used for interstate access. In such circumstances, the end user dials a seven-digit number to reach the LEC's "dial tone office" serving an IXC, where the LEC switches the call to the IXC's POP via a dedicated line-side connection. Feature Group A represents approximately one percent of incumbent LEC transport revenues.

[2092] Feature Group D is the set of elements through which IXCs today almost universally purchase switched access services from incumbent LECs.

[2093] *See, e.g.*, Cincinnati Bell comments at 34; Citizens Utilities comments at 25; NYNEX comments at 35 n.70; Rural Tel. Coalition comments at 20; J. Staurulakis comments at 6; SBC reply at 13; USTA reply at 31; Wisconsin Commission comments at Attachment, pp. 7-8.

[2094] 47 U.S.C. § 69.5(b).

[2095] The one exception, as discussed below, is the SLC, which is assessed on end users regardless of who purchases the access services from the incumbent LEC.

services available for resale at wholesale rates to parties who are not "telecommunications carriers" or who are purchasing service for their own use. The wholesale pricing requirement is intended to facilitate competition on a resale basis. Further, the negotiation process established by Congress for the implementation of section 251 requires incumbent LECs to negotiate agreements, including resale agreements, with "requesting telecommunications carrier or carriers,"[2096] not with end users or other entities. We further discuss the definition of "telecommunications carrier" in Section IX. of the Order.

876. With regard to independent public payphone providers, however, we agree with the American Public Communication Council's argument that such carriers are not "telecommunications carriers" under section 3(44). We therefore also agree with the American Public Communications Council's contention that the services independent public payphone providers obtain from incumbent LECs are telecommunications services that incumbent LECs provide "at retail to subscribers who are not telecommunications carriers" and that such services should be available at wholesale rates to telecommunications carriers. Because we conclude that independent public payphone providers are not "telecommunications carriers," however, we conclude that incumbent LECs need not make available service to independent public payphone providers at wholesale rates. This is consistent with our finding that wholesale offerings must be purchased for the purpose of resale by "telecommunications carriers."

877. We conclude that the plain language of the 1996 Act requires that the incumbent LEC make available at wholesale rates retail services that are actually composed of other retail services, *i.e.*, bundled service offerings. Section 251(c)(4) states that the incumbent LEC must offer for resale "any telecommunications service" provided at retail to subscribers who are not telecommunications carriers. The resale provision of the 1996 Act does not contain any language exempting services if those services can be duplicated or approximated by combining other services. On the other hand, section 251(c)(4) does not impose on incumbent LECs the obligation to disaggregate a retail service into more discrete retail services. The 1996 Act merely requires that any retail services offered to customers be made available for resale.

B. Wholesale Pricing

1. Background

878. As discussed above, section 251(c)(4) requires incumbent LECs to offer at "wholesale rates" any telecommunications services that the carrier provides at retail to subscribers who are not telecommunications carriers. Section 252(d)(3) establishes the standard that states must use in determining wholesale rates in arbitrations or in reviewing wholesale rates under BOC statements of generally available terms and conditions. Specifically, section 252(d)(3) provides that wholesale rates shall be set "on the basis of retail rates charged to subscribers for

[2096] 47 U.S.C.§ 252(a)(1).

the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier."[2097]

879. In the NPRM, we generally sought comment on the meaning of the term "wholesale rates" in section 251(c)(4).[2098] We asked if we could and should establish principles for the states to apply in order to determine wholesale prices in an expeditious and consistent manner. We also sought comment on whether we should issue rules for states to apply in determining avoided costs. We stated that we could, for example, determine that states are permitted under the 1996 Act to direct incumbent LECs to quantify their costs for any marketing, billing, collection, and similar activities that are associated with offering retail, but not wholesale, services.[2099] We also sought comment on whether avoided costs should include a share of common costs and general overhead or "markup" assigned to such costs. LECs would then reduce retail rates by this amount, offset by any portion of expenses that they incur in the provision of wholesale rates.[2100] We noted that this approach appeared to be consistent with the 1996 Act, but would create certain administrative difficulties because all of the information regarding costs is under the control of the incumbent LECs.[2101] We also asked for comment on several alternative approaches. For example, we asked whether we could establish a uniform set of presumptions regarding avoided costs that states could adopt and that would apply in the absence of a quantification of such costs by incumbent LECs.[2102] Additionally, we asked whether we should identify specific accounts or portions of accounts in the Commission's Uniform System of Accounts ("USOA")[2103] that the states should include as avoided costs.[2104] We also requested comment on whether we should

---

[2097] 47 U.S.C. § 252(d)(3).

[2098] NPRM at para. 179.

[2099] *Id.* at para. 180.

[2100] *Id.*

[2101] *Id.*

[2102] *Id.* at para. 181.

[2103] 47 C.F.R. § 32.

[2104] NPRM at para. 181.

establish rules that allocate avoided costs across services.[2105] We asked whether incumbent LECs should be allowed, or required, to vary the percentage wholesale discounts across different services based on the degree the avoided costs relate to those services.[2106] Finally, we asked whether we should adopt a uniform percentage discount off of the retail rate of each service.[2107]

2. Comments

880. Most commenters other than incumbent LECs and some states advocate establishment of national pricing rules regarding arbitrated rates for competitors' acquisition of services for resale under section 251(c)(4).[2108] Incumbent LECs and state commissions argue that we do not have the authority to establish such rules and, even assuming such authority exists, we should not exercise it.[2109] Bay Springs, *et al.*, GVNW, and the Rural Telephone Coalition argue that establishing national wholesale pricing rules would insufficiently recognize differences in LECs' operations, resulting in inadequate compensation for small incumbent LECs.[2110]

881. Many commenters preface their arguments concerning wholesale discounts calculation with a general discussion of the role of resale in creating a competitive local exchange market. IXCs and resellers argue that resale is the quickest method of developing ubiquitous competition and therefore encourage the Commission to adopt of national rules that would result

---

[2105] *Id.* at para. 182.

[2106] *Id.*

[2107] *Id.*

[2108] *See, e.g.*, AT&T comments at 82; Cable & Wireless comments at 37; CompTel comments at 96; MFS comments at 72; LCI comments at 31; Telecommunications Resellers Ass'n comments at 24; Teleport comments at 55-56; TCC comments at 45.

[2109] *See, e.g.*, BellSouth comments at 67; SBC comments at 74; District of Columbia Commission comments at 32; Pennsylvania Commission comments at 37.

[2110] Bay Springs, *et al.*, comments at 17; GVNW comments at 40; Rural Tel. Coalition comments at 21. For example, the Rural Telephone Coalition points out that setting a national wholesale discount based on certain assumed levels of marketing expenses overstates avoided costs for small and rural incumbent LECs because such carriers face less competition and therefore have fewer marketing expenses. Rural Telephone Coalition comments at 21. Similarly, Bay Springs, *et al.*, GVNW, and the Rural Telephone Coalition argue that smaller incumbent LECs will not be able to avoid as many shared costs because their smaller staffing and operational functions are less responsive to the overall size of the carriers' operations. Bay Springs, *et al.*, comments at 17; GVNW comments at 40; Rural Tel. Coalition comments at 21.

in substantial wholesale discounts.[2111] AT&T argues that a discount that does not permit viable competition should be presumed unreasonable.[2112] Cable & Wireless and the Telecommunications Resellers Ass'n point out that resale will be a particularly important market entry strategy for small businesses that cannot afford the investments necessary to construct their own facilities or purchase unbundled elements.[2113]

882. Incumbent LECs, cable companies, CAPs, and Sprint generally argue for low wholesale discounts.[2114] Facility-based competitors and potential competitors, such as MFS and cable operators, argue that we should focus our efforts on encouraging facilities-based competition. Such parties, including incumbent LECs, claim that large resale discounts will discourage the development of facilities by making it unnecessary for a new entrant to construct its own facilities in order to compete effectively on the basis of price.[2115] MFS and GTE state that wholesale pricing should only be applied in the absence of facilities-based competition and that once such competition exists, we should forbear from imposing wholesale pricing on incumbent LEC services offered for resale.[2116] Incumbent LECs, cable operators, and Sprint oppose AT&T's proposal that discounts that do not permit viable competition should be presumed unreasonable.[2117]

883. Parties favoring national rules regarding resale differ as to the form such rules should take. Some propose that we establish a methodology for calculating avoided costs. For

---

[2111] *See, e.g.*, AT&T reply at Appendix E (Avoided Cost Model); Cable & Wireless comments at 38.

[2112] AT&T comments at 85.

[2113] Cable & Wireless at 35; Telecommunications Resellers Ass'n at 15. The Competition Policy Institute similarly argues that resale will bring both large and small (resale) carriers into the market. Competition Policy Institute comments at 24.

[2114] *See, e.g.*, GTE reply at 25-26; NYNEX comments at 40-41; NCTA comments at 23; TCI comments at 8; MFS reply at 34-36; Sprint reply at 41.

[2115] *See, e.g.*, NCTA comments at 29-30; Comcast comments at 21; Cox comments at 32; Time Warner comments at 70; MFS comments at 72; U S West comments, Exhibit A (Federal Implementation of the Telecommunications Act of 1996) at 26; BellSouth comments at Attachment (Interconnection and Economic Efficiency), p. 19; Bell Atlantic comments at Attachment (Declaration of Robert W. Crandall), pp. 4-5.

[2116] This forbearance would be pursuant to 47 U.S.C. § 160. MFS comments at 72 n.80; GTE reply at 26 n.44.

[2117] *See, e.g.*, Bell Atlantic reply at 24; Time Warner reply at 22; Sprint reply at 40.

example, certain parties advocate a rule requiring the use of long-run incremental cost.[2118] Others advocate some form of proxies or presumptions to determine avoided costs. NEXTLINK argues that the Commission should establish a uniform set of presumptions regarding the types of costs that are to be avoided and require that calculations of avoided costs be based on publicly available sources.[2119] NEXTLINK contends that these requirements would allow rapid identification of avoided costs and should lead to the development of presumptive percentage discounts that will apply to retail rates.[2120]

884. Incumbent LECs and MFS also argue that "avoided" costs are those that are actually avoided by such carriers instead of costs that are theoretically "avoidable."[2121] GTE argues that an "avoidable" standard improperly measures avoided costs in the long run versus actually avoided costs.[2122] IXCs and resellers argue that the standard should be "avoidable" costs; otherwise, incumbent LECs will be able to game their accounting systems and business practices to minimize actually "avoided" expense.[2123]

885. A number of parties propose that this Commission specify various USOA accounts as avoided costs.[2124] Several parties introduced models or studies that use accounting data to calculate wholesale discounts. These proposals are summarized in detail in the next section.

[2118] *See, e.g.*, GSA/DoD comments at 11.

[2119] NEXTLINK comments at 33.

[2120] *Id.* Also, the Telecommunications Resellers Ass'n advocates establishing a minimal discount, to which states may add, but not delete, unless they petition the FCC for express exemption. Telecommunications Resellers Ass'n comments at 24-25.

[2121] *See, e.g.*, GTE reply at 25-26; NYNEX comments at 81; SBC reply at 15 n.35; USTA reply at 30; MFS comments at 72.

[2122] *See* Rebuttal Testimony of Douglas E. Wellemeyer, *Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominant Carrier Networks*, R. 93-04-003 and I. 93-04-002 (California Commission July 10, 1996), submitted as attachment to Letter from Whitney Hatch, Assistant Vice President--Regulatory Affairs, GTE, to John Nakahata, Senior Legal Advisor, Chairman Reed E. Hundt, FCC, July 18, 1996.

[2123] *See, e.g.*, AT&T comments at 84 n.129; Cable & Wireless reply at 29.

[2124] *See* AT&T comments at 83-84 n.130-131; GCI comment at 15; MCI comments at Attachment 2 (Pricing of Wholesale Services); TCC comments at 45-46; Telecommunications Resellers Ass'n comments at 25-26; Sprint comments at Appendix C. While not providing specific USOA accounts, several parties encourage the Commission to identify these accounts. *See*, e.g., ACSI comments at 61.

886. Some parties recommend that we adopt a specific percentage discount from the retail rate. For example, the Massachusetts Attorney General recommends an interim discount of 25 percent until carrier-specific cost studies can be performed.[2125] ACTA suggests that we adopt a 25 percent discount as a national standard.[2126] Several cable interests recommend ten percent maximum discounts, at least until avoided cost studies can be performed.[2127] The Telecommunications Resellers Association suggests that discounts in the range of 30 to 50 percent off the retail rate are necessary to allow resellers to provide competition.[2128] AT&T argues that, whatever discount is selected, states should be allowed to increase it to promote competition.[2129] Furthermore, AT&T argues that states should be allowed to impose penalties in the form of increased discounts for failure to provide service of equivalent quality offered to incumbent LEC customers or to provide electronic interfaces to the incumbent LEC network.[2130] Incumbent LECs and MFS argue that the 1996 Act does not authorize the service quality penalties or competition-enhancing increased discounts suggested by AT&T.[2131]

887. MFS, Teleport, Time Warner, the Massachusetts Commission, and a number of incumbent LECs argue that joint, common, and overhead costs should not be included in the calculation of avoided costs.[2132] They argue that these costs are not avoided because they will continue to be incurred in providing wholesale service. AT&T, MCI, and others favor inclusion of a portion of joint, common, and overhead costs in avoided costs because these costs will decrease as the overall level of operations of an incumbent LEC decrease (as a result of

---

[2125] Mass. Attorney General comments at 24.

[2126] ACTA comments at 31-32.

[2127] *See, e.g.*, Comcast comments at 21; NCTA comments at 41.

[2128] Telecommunications Resellers Ass'n comments at 24.

[2129] AT&T comments at 84.

[2130] *Id.* at 84-85.

[2131] *See, e.g.*, MFS reply at 36; Bell Atlantic reply at 24; Sprint reply at 42.

[2132] *See, e.g.*, MFS comments at 74; Teleport comments at 56-57; Time Warner comments at 77; Mass. Commission comments at 14-15; Ameritech comments at 80; BellSouth comments at 67; Cincinnati Bell comments at 35; GTE comments at 51; Lincoln Tel. reply at 8; U S West comments at 68-69; PacTel comments at 90; Rural Tel. Coalition reply at 15; USTA comments at Attachment (Affidavit of Jerry A. Hausman), p. 11.

downscaling their retail operations).[2133]

888. There is significant disagreement about whether wholesale rates should take into account any additional costs incumbent LECs incur in providing wholesale service, such as those relating to wholesale marketing and billing operations. Incumbent LECs, facilities-based competitors, Sprint, and others argue that wholesale rates must include such costs to ensure recovery from the cost-causing parties -- resellers.[2134] Some incumbent LECs note that these additional costs could also be recovered through a separate charge.[2135] IXCs and resellers argue that the plain language of the section 252(d)(3) does not provide for the recognition of these costs.[2136] They also add that allowing incumbent LECs to recover these costs from resellers discourages efficiency in their wholesale operations.[2137]

889. A number of incumbent LECs oppose application of a single percentage discount rate for all services, arguing that avoided costs will vary among different services.[2138] Some state commissions also recommend against adoption of a uniform rate.[2139] MFS argues that, because section 252(d)(3) refers to retail rates charged to subscribers "for the telecommunications service requested," a uniform wholesale discount rate would frustrate Congressional intent.[2140] Advocates of a uniform discount, however, contend that incumbent LECs will be able to game any system involving a nonuniform allocation of avoided cost, because the information regarding such costs

---

[2133] *See, e.g.*, TCC comments at 45-46; AT&T reply at Appendix E (Avoided Cost Model); MCI comments at Attachment 2 (Pricing of Wholesale Services), p. 9; Texas Public Utility Counsel comments at 45-46.

[2134] *See, e.g.*, Ameritech comments at 80; Bell Atlantic comments at 44-45; BellSouth comments at Attachment (Interconnection and Economic Efficiency), p. 20; Citizens Utilities comments at 25; USTA comments at Attachment (Affidavit of Jerry A. Hausman), p.12, reply at 29; MFS comments at 73-74; Teleport comments at 57; Time Warner comments at 78; Ohio Commission comments at 59-60, 66; Sprint comments at 72; J. Staurulakis comments at 10.

[2135] *See, e.g.*, BellSouth comments at 67; NYNEX comments at 83.

[2136] *See, e.g.*, AT&T reply at 10; LDDS reply at 45; TCC comments at 47; Cable & Wireless reply at 28-29; Telecommunications Resellers Ass'n reply at 18.

[2137] LDDS reply at 45. LDDS argues that such costs should be recovered in a competitively-neutral manner. *Id.*

[2138] *See, e.g.*, Bell Atlantic comments at 46; USTA comments at 74-75; MFS comments at 73.

[2139] *See, e.g.*, California Commission comments at 37-38.

[2140] MFS comments at 73.

is under their control.[2141] Advocates of a uniform discount also argue that apportioning avoided costs over specific services can be difficult, while a uniform rate is simple to apply. Ameritech argues that the wholesale rate structure of an incumbent LEC should not mirror its retail rate structure. Rather, it should be based on a weighted average of all retail rates provided by the incumbent LEC, less avoided cost.[2142]

3. The Models and Study

890. MCI and AT&T introduced models, and Sprint submitted a study for calculating wholesale rates. This section describes each of these proposals and summarizes the criticisms directed against them. AT&T and MCI offer models which, they contend, can be used to generate discount rates for each incumbent LEC's retail offerings. As an example of the avoided cost approach Sprint advocates, Sprint submits a study based on its United Telephone subsidiary operations in Tennessee.[2143]

891. MCI's model uses publicly available USOA data.[2144] MCI analyzes three categories of avoided cost: (1) marketing, billing, and collection costs; (2) "other costs"; and (3) common costs allocated to avoided cost activities. MCI identifies the following USOA accounts as avoided marketing, billing, and collection costs:

Account 6611 (product management)
Account 6612 (sales)
Account 6613 (product advertising)
Account 6621 (call completion services)
Account 6622 (number services)
Account 6623 (customer services)
Account 6722 (external relations)
Account 6727 (research and development)

[2141] *See, e.g.*, Cable & Wireless comments at 47; TCC comments at 47, Telecommunications Resellers Ass'n reply at 18-19; NEXTLINK comments at 33.

[2142] Ameritech comments at 58. For example, this would average various time-of-day plans and usage plans.

[2143] Sprint comments at Appendix C (Avoided Cost Study: Tennessee United Telephone--S.E., Inc.).

[2144] MCI comments at Attachment 2 (Pricing of Wholesale Services).

MCI treats as "other" avoided costs all of the expenses recorded in the following accounts:

Account 6113 (aircraft expense)
Account 6341 (large PBX expense)
Account 6351 (public telephone terminal equipment expense)
Account 6511 (property held for future telecommunications use)
Account 6512 (provisioning expense)
Account 6562 (depreciation expense--property held for future telecommunications use)
Account 6564 (amortization expense--intangible)

MCI's model also allocates to avoided cost activities a portion of the general overhead and general support expenses recorded in the following accounts:

general overhead
Account 6711 (executive)
Account 6712 (planning)
Account 6721 (accounting and finance)
Account 6723 (human resources)
Account 6724 (information management)
Account 6725 (legal)
Account 6726 (procurement)
Account 6728 (other general and administrative)
Account 6790 (provision for uncollectible notes receivable)

general support
Account 6121 (land and building expense)
Account 6122 (furniture and artworks expense)
Account 6123 (office equipment expense)
Account 6124 (general purpose computers expense)

MCI uses an iterative process to determine separate avoided cost percentages for general overhead costs and for general support costs.[2145] The resulting percentages are based on the relative ratios

[2145] The formulae used by MCI in calculating certain overhead and general support costs are dependent on variables affected by the result of the calculation of such costs. Iteration is a means of solving for variables in such circumstances.

of avoided costs to total operating expense.[2146] MCI's model assumes that incumbent LECs incur no additional expenses in providing wholesale services.

892. After total avoided costs are determined, MCI subtracts the total avoided costs from total operating expenses to derive total wholesale expenses. MCI then calculates wholesale service revenue using a formula that allows the incumbent LEC the same proportional mark-up above costs on wholesale services as on its retail services.[2147] The formula sets the ratio of total revenue less total expenses to total revenue (retail markup) equal to the ratio of wholesale revenue less wholesale expenses to wholesale revenues (allowable wholesale markup) then computes wholesale revenue (and rates) by solving for that variable in a simple equation.[2148] MCI computes a wholesale discount rate as one minus the ratio of wholesale revenue over total revenue. Wholesale rates are computed by reducing retail rates by the wholesale discount.

893. MCI proposes that states use its model to calculate a single wholesale discount rate for each incumbent LEC that would apply in every state in which that incumbent LEC does business and for all services the incumbent LEC provides for resale. States would apply that rate

---

[2146] Total Avoided Expense = [Not Avoided Expenses * 0%] + [Totally Avoided Expenses * 100%] + [Partially Avoided Expenses * a%] + [Partially Avoided Expenses * b%]

Where:

$$a = \%\ \text{Corporate Operations Avoidable} = \frac{\text{Total Avoided Expenses}}{\text{Total Expenses - Depreciation \& Amortization Expense}}$$

$$b = \%\ \text{General Support Avoidable} = \frac{\text{Total Avoided Expenses}}{\text{Total Expenses - General Support}}$$

[2147] $$\text{Wholesale Price Discount} = 1 - \frac{\text{Wholesale Service Revenue}}{\text{Total Operating Revenue}}$$

Where:

$$\text{Wholesale Service Revenue} = \frac{\text{Total Wholesale Expenses}}{(1 - \text{Base Margin})}$$

Total Wholesale Expenses = Total Operating Expenses - Total Avoided Costs

$$\text{Base Margin} = \frac{\text{Total Operating Revenue - Total Operating Expenses}}{\text{Total Operating Revenue}}$$

[2148] $$\frac{\text{Retail Revenue - Total Expenses}}{\text{Retail Revenue}} = \frac{\text{wholesale revenue - (total expenses - avoided expenses)}}{\text{wholesale revenue}}$$

$$\text{Wholesale Revenue} = \text{Retail Revenue} - \left[\text{Avoided expenses} \times \left[\frac{\text{Retail Revenue}}{\text{Total Expenses}}\right]\right]$$

This is as compared to: Wholesale Revenue = Retail Revenue - Avoided Expenses

to each of the incumbent LECs' retail services. For the seven BOCs and GTE, MCI's calculated wholesale discount factors range from 25 to 35 percent.[2149] MCI suggests that its study be declared presumptively valid by the Commission, but suggests that the Commission allow states to adopt a different resale discount by showing that the model does not produce an accurate result.[2150]

894. Sprint, several incumbent LECs, and potential facilities-based entrants, criticize the MCI model. Lincoln Telephone faults the underlying MCI study for relying on a sample of only eight companies, arguing that the limited sample does not capture the variety of billing, costing and collecting arrangements of all existing carriers.[2151] Several incumbent LECs, although not criticizing the MCI study specifically, oppose any approach that utilizes USOA accounts,[2152] or calculates the resale discount by deducting avoidable, as opposed to actually avoided, costs.[2153] Others attack MCI's method of computing wholesale rates once avoided costs are measured.[2154] MFS argues that there is no statutory basis for MCI's use of a formula that removes the markup associated with avoided retail expenses from the retail rates.[2155]

895. AT&T's avoided cost model is similar to MCI's model in that it is an embedded cost approach that starts with publicly-available accounting data.[2156] AT&T's model, however, involves several additional layers of calculations. The model assigns incumbent LEC Automated Record Management Information Systems (ARMIS) revenue and expense data to five lines of business (units). For the local business unit, which it uses as the applicable unit for resale under section 251(c)(4), avoidable expenses are computed by USOA account. AT&T argues that all of

---

[2149] MCI comments at Attachment 2 (Pricing of Wholesale Services), p. 12.

[2150] MCI comments at 90.

[2151] Lincoln Tel. comments at 8-9.

[2152] *See, e.g.*, BellSouth reply at 41; PacTel reply at 45-46.

[2153] *See, e.g.*, SBC reply at 15; NYNEX reply at 40; Ameritech reply at 37-39.

[2154] MFS reply at 36.

[2155] *Id.* This was also a point debated by incumbent LECs in various state proceedings. *See, e.g., Petition for a Total Local Exchange Wholesale Service Tariff from Illinois Bell Telephone Company*, Nos. 95-0458 and 95-0531 (consol.) (Illinois Commission June 26, 1996) at 5-20. Teleport argues that the Illinois Commission's decision to include a portion of profit contribution was incorrect. Teleport comments at 59.

[2156] AT&T reply at Appendix E (Avoided Cost Model).

the costs associated with the following USOA accounts categories should be excluded as avoided costs, many of which are summary accounts and subsume a set of other accounts:

Account 5300 (uncollectibles)
Account 6220 (operator systems expense) (if appropriate)
Account 6533 (testing expense)
Account 6534 (plant operations administration expense)
Account 6610 (marketing expense)
Account 6620 (customer service expense)

AT&T further argues that the portion of the following USOA accounts associated with the incumbent LEC's retail operations should be excluded as avoided costs:

Account 6110 (network support expense)
Account 6120 (general support expense)
Account 6560 (depreciation expense)
Account 6710 (executive and planning expense)
Account 6720 (general and administrative expense)
Account 7240 (operating other taxes)
Account 7540 (other interest deductions)

AT&T also recommends partial avoidance of "Total Returns," which refers to portions of the retail rate that contributes to an incumbent LEC's earnings. Ultimately, under AT&T's model, the sum of avoided direct and indirect retail costs is divided by the local service-related revenues to derive the avoided cost discount. AT&T applies its model to each state, with the exception of Alaska, and derives discount rates that range from 23 percent to nearly 56 percent. Parties did not have an opportunity to comment specifically on the AT&T model during the pleading cycle of this proceeding because it was submitted with AT&T's reply. However, AT&T identified in its initial comments the list of fully and partially avoided USOA accounts that were ultimately used in its model. Criticisms of these classifications of fully and partially avoided costs are discussed below.

896. Sprint submits a sample study of its LEC subsidiary operations in Tennessee as an example of how the avoided cost approach advocated by Sprint would be applied.[2157] It was undertaken at the request of the Tennessee Commission to be used under the 1996 Act for calculating wholesale costs. Specifically, the study examines rates for resale of bundled services, focusing on those categories of costs defined in the 1996 Act (marketing, billing, collection, and other costs). Sprint describes its study as employing an activity-based cost approach that identifies the avoided cost by cost category and assigns these costs to service groups, based on a computed factor that assigns each specific type of expense to the activity that creates or drives

[2157] Sprint comments at Appendix C (Avoided Cost Study: Tennessee United Telephone–S.E., Inc.).

that expense. Sprint does not provide the worksheets detailing this cost assignment because Sprint considers the worksheets to be proprietary. Costs are identified at the subaccount level. Sprint computes the percentage of avoided costs of providing simple access service at wholesale as a percentage of simple access revenue to be 4.76 percent. Sprint computes a 7.19 percent figure for other services. In its reply comments, Sprint suggests that the AT&T and MCI models significantly overstate incumbent LEC avoided costs.

897. Parties also commented on the specific USOA accounts that should be used to identify avoided costs. We summarize below the comments with respect to the various accounts:

Marketing expenses--Account 6611 (product management), Account 6612 (sales), and Account 6613 (product advertising):

Resellers and most IXCs, other than Sprint, all support identification of these accounts as completely avoidable, both because they are explicitly mentioned in the 1996 Act and because these expenses would not be necessary in a wholesale operation.[2158] Incumbent LECs, Sprint, MFS, and Time Warner argue that expenses recorded in these accounts would, in fact, be incurred in connection with the provision of wholesale services such as marketing to wholesalers.[2159]

Services expenses--Account 6621 (call completion services), Account 6622 (number services), and Account 6623 (customer services):

IXCs and resellers contend that all of the expenses recorded in these accounts should be treated as avoidable costs because a reseller will either purchase these services separately or provide them itself.[2160] Incumbent LECs and Sprint argue that these services have no relation to local retail service and therefore cannot be included in avoided costs used to compute wholesale local service rates.[2161]

[2158] *See, e.g.*, Cable & Wireless comments at 46 n.77; Telecommunications Resellers Ass'n comments at 25-26; AT&T comments at 84 n.130; CompTel comments at 96-97; MCI comments at Attachment 2 (Pricing of Wholesale Services), p. 5-6.

[2159] *See, e.g.*, Ameritech reply at 38; Bell Atlantic reply at 23; GTE reply at 25 n.40; MFS reply at 35; Time Warner reply at 21; USTA reply at 30; Sprint reply at 38.

[2160] *See, e.g.*, AT&T comments at 84 n.130; MCI comments at Attachment 2 (Pricing of Wholesale Services), p. 6; Cable & Wireless comments at 46 n.77; Telecommunications Resellers Ass'n comments at 25-26. CompTel states that such accounts should be avoided where appropriate. CompTel comments at 96-97.

[2161] *See, e.g.*, Bell Atlantic reply at 23 (with respect to account 6623); USTA reply at 30 (account 6623 includes costs devoted to customer service relating to interexchange service); Sprint reply at 38-39 (also identifies account 6623 as relating to separately billed services). PacTel agrees that costs of directory

Information origination/termination expenses and other property, plant and equipment expenses--Account 6341 (large PBX expense), Account 6351 (public telephone terminal equipment expense), Account 6511 (property held for future telecommunications use), and Account 6512 (provisioning expense):

MCI and Cable & Wireless identify accounts 6341 (large PBX expense), 6351 (public telephone terminal equipment expense), 6511 (property held for future telecommunications use) and 6512 (provisioning expense) as completely avoidable,[2162] while incumbent LECs, MFS and Sprint argue that these expenses are not associated with retail activities.[2163]

Account 6220 (operator systems expense):

AT&T, TCC, and GCI argue that this account is wholly avoidable where resellers choose not to purchase operator services[2164] while Sprint argues that the account is unrelated to local service.[2165]

Account 6790 (provision for uncollectible notes receivable)/5300 (uncollectible revenue):

AT&T, TCC, and GCI argue that the sum recorded in account 5300 represents a revenue offset that is wholly avoidable.[2166] MCI chooses to measure uncollectibles using account 6790, arguing that expenses in this account are partially avoidable.[2167] Sprint and Time Warner disagree with the contention that uncollectibles are avoidable at all, claiming that uncollectibles may actually increase in a wholesale operation.[2168]

---

assistance call allowances, directory listing, and telephone directories will continue to be incurred. PacTel reply at 46.

[2162] MCI comments at Attachment 2 (Pricing of Wholesale Services), p. 8; Cable & Wireless comments at 46 n.77.

[2163] MFS reply at 35-36; Sprint reply at 38; GTE reply at 25 n.40 (at least with respect to accounts 6341 and 6351).

[2164] AT&T reply at Appendix E (Avoided Cost Model); TCC comments at 45 n.45; GCI comments at 1.

[2165] Sprint reply at 38.

[2166] AT&T comments at 84 n.130; AT&T reply, Appendix E (Avoided Cost Model); TCC comments at 45 n.45; GCI comments at 1.

[2167] MCI comments at Attachment 2 (Pricing of Wholesale Services), p. 9.

[2168] Sprint reply at 37; Time Warner reply at 21.

Network support expenses (Accounts 6112-6116):

AT&T, TCC, GCI, and the Telecommunications Resellers Association assert that all of these accounts are partially avoidable.[2169] MCI only discusses account 6113 (aircraft expense), identifying it as completely avoidable because it is not related to wholesale services.[2170] Sprint and MFS disagree, arguing that there is no evidence that costs in these accounts will decrease with wholesale offerings because these expenses will have to continue to be incurred.[2171]

General support expenses (Accounts 6121-6124) and Account 6711 (executive), Account 6712 (planning), and Accounts 6721-6728 (general and administrative expenses):

Resellers and IXCs contend that the shared expenses recorded in these accounts are partially avoidable.[2172] MCI and Cable & Wireless identify accounts 6722 (external relations) and 6727 (research and development) as completely avoidable.[2173] MCI argues that overhead costs support all of the activities, including the activities that are avoided when services are sold at wholesale. Therefore, according to MCI, a portion of overhead expenses must be treated as avoided cost.[2174] AT&T argues that wholesaling will necessarily lead to an overall reduction in the size of an incumbent LEC's operations and thus to a reduction in shared expenses.[2175] Sprint and Time Warner argue that there is no evidence to support a conclusion that resale will lead to a general reduction in shared expenses.[2176]

[2169] AT&T comments at 84 n.131; TCC comments at 46 n.46; GCI comments at 1; Telecommunications Resellers Ass'n comments at 25-26.

[2170] MCI comments at Attachment 2 (Pricing of Wholesale Services), p. 8.

[2171] MFS reply at 35 (only discusses account 6113); Sprint reply at 39-40.

[2172] *See, e.g.*, Telecommunications Resellers Ass'n comments at 25-26; AT&T comments at 84 n.131.

[2173] MCI comments at Attachment 2 (Pricing of Wholesale Services), p. 6-7; Cable & Wireless comments at 47 n.79.

[2174] MCI comments at Attachment 2 (Pricing of Wholesale Services), p. 9.

[2175] AT&T reply, Appendix E (Avoided Cost Model) at 2.

[2176] Sprint reply at 39-40; Time Warner reply at 21

Depreciation and amortization expenses (Accounts 6561-6565) and operating taxes (Accounts 7220-7240):

Resellers and IXCs also argue to varying degrees that such expenses are partially avoidable.[2177] MCI and Cable & Wireless argue for the complete avoidance of accounts 6562 (depreciation expense--property held for future telecommunications use) and 6564 (amortization expense--intangible).[2178] MFS, Sprint, and Time Warner argue that these costs will continue to be incurred for wholesale operations.[2179]

Other partially avoided accounts:

AT&T, TCC, and GCI argue that accounts 6533 (testing expenses), 6534 (plant operations administration expense), and 7540 (other interest), and total returns are partially avoidable[2180] while Sprint disagrees.[2181]

4. State Decisions

898. Several state commissions have already made interim or final determinations with respect to wholesale rates. Some, like the California and Maryland commissions, did not purport to apply or interpret the 1996 Act. Others, including the Illinois and Georgia commissions, explicitly applied section 252(d)(3) in reaching their decisions. Post-1996 Act state decisions announced to date are summarized below.

899. *California:* The California Commission adopted interim rules, effective March 31, 1996, for the resale of local exchange services by competitive LECs within the areas served by Pacific and GTE.[2182] Although the record in that proceeding was closed before the passage of the 1996 Act, the California Commission applied a "retail rates minus avoided cost" standard similar

---

[2177] *See, e.g.*, Telecommunications Resellers Ass'n comments at 25-26; AT&T comments at 84 n.131; CompTel comments at 97.

[2178] MCI comments at Attachment 2 (Pricing of Wholesale Services), p. 9; Cable & Wireless comments at 47 n.79.

[2179] MFS reply at 35-36 (account 6564 is not related to retail); Sprint reply at 39-40; Time Warner reply at 21.

[2180] AT&T comments at 84 nn.130-31; TCC comments at 46 n.46; GCI comments at 1. Sprint does not comment on account 7540.

[2181] Sprint reply at 39-40.

[2182] *Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service*, R. 95-04-043 and I. 95-04-044 (California Commission April 26, 1996). Although the final order was not issued until April 26, 1996, it became effective March 31, 1996.

to that contained in section 252(d)(3) for purposes of setting interim rates. The California Commission used an embedded cost study and USOA accounting data to calculate business discounts rates of 17 percent for PacTel and 12 percent for GTE. Because it had previously found that residential rates were already below direct embedded cost, the California Commission applied to residential services a reduced discount rate of 10 percent for PacTel and 7 percent for GTE. In arriving at this conclusion, the California Commission considered uncollectibles, marketing, and customer service expenses to be partially avoidable, to varying degrees.

900. *Colorado:* The Colorado Commission established a business discount rate of 16 percent and a residential discount rate of 9 percent.[2183] Using Colorado-specific embedded cost information previously filed by U S West as part of an annual report to that commission, the Colorado Commission calculated avoided costs for five categories of services. The Colorado Commission treated the following costs as totally avoided: uncollectibles; direct expense associated with operator services; customer operations (product management, sales, and product advertising); call completion; and number services. The Colorado Commission also considered 95 percent of the costs of customer services to be avoidable. General purpose computer expense and related depreciation, and general corporate overheads, were treated as partially avoided. The Colorado Commission concluded that wholesale discounts should be as follows: residential, 9 percent; business, 16 percent; toll services, 30 percent; central office-based features, 50 percent; all other services, 18 percent.

901. *Georgia:* The Georgia Commission established a 20.3 percent discount rate for wholesale residential service and a 17.3 percent discount rate for wholesale business service.[2184] The Georgia Commission used embedded cost information to calculate avoided direct expenses. The Georgia Commission also found that a percentage of general support, administrative, and corporate operations expenses should be considered avoided costs. In computing its final discounts, the Georgia Commission apportioned total avoided expense between residential and business services according to BellSouth's revenues for the two categories. Prior to such apportionment, the Georgia Commission's discount was 18.74 percent.

902. *Illinois:* The Illinois Commission released an order on June 26, 1996, setting wholesale discount rates for Ameritech and Centel local exchange services.[2185] The Illinois Commission applied the section 252(d)(3) pricing standard, but rejected use of embedded cost

---

[2183] *U S West Communications, Inc. Filing Advice Letter No. 2610 in Compliance with Commission Decision No. C96-521 Adopting Emergency Rules*, Docket No. 96S-233T (Colorado Commission June 21, 1996).

[2184] *Petition of AT&T for the Commission to Establish Resale Rules, Rates, Terms, and Conditions and Initiate Unbundling of Services*, Docket No. 6352U (Georgia Commission June 21, 1996).

[2185] *Petition for a Total Local Exchange Wholesale Service Tariff from Illinois Bell Telephone Company*, Nos. 95-0458 and 95-0531 (consol.) (Illinois Commission June 26, 1996).

studies as inconsistent with the Commission's established cost of service rules. Instead, the Illinois Commission based its analysis on a methodology that begins with retail rates, then subtracts: (1) the "total assigned cost" of retail functions; and (2) a *pro rata* share of contribution attributable to the avoided retail costs. Total assigned costs include the long-run incremental costs of a service plus some shared and administrative costs. Contribution is the difference between retail price and long-run incremental cost. The Illinois Commission expects that this methodology, when applied to individual Ameritech services using the carrier's most recently-filed cost studies, will produce an average discount rate of 20.07 percent.[2186] The Illinois Commission applied the same rate to Centel, pending completion by Centel of the cost studies needed to apply the Illinois Commission's adopted methodology.

903. *Louisiana:* The Louisiana Commission established regulations concerning resale of telecommunications services on March 15, 1996.[2187] As an interim measure, until the Louisiana Commission can determine wholesale rates based on TSLRIC cost studies, the commission has set wholesale rates at the incumbent LEC's current tariffed retail rates minus 10 percent. This calculation reflects the incumbent LEC's avoidance of retail costs, including but not limited to, sales, marketing and customer services associated with the resold items.

904. *Maryland:* The Maryland Commission adopted, without analyzing cost studies, an interim discount rate of 10 percent, pending completion of the instant rulemaking proceeding.[2188]

905. *New York:* The New York Commission established temporary wholesale discounts for NYNEX and Rochester Telephone on July 18 of this year.[2189] The New York Commission calculates for NYNEX a 17 percent discount for residential service and an 11 percent discount for business service. Separate avoided cost percentages were derived for different shared expense categories, ranging from five percent for general and administrative expenses to 12.7 percent for

---

[2186] The Illinois Commission notes that the pricing methodology that it adopted would yield an average discount of 20.07 percent if applied at the individual service level and 16.63 percent if applied to the "family" service level. *Id.* at 10. Illinois decided that the individual service application avoided certain pricing anomalies and was more consistent with the 1996 Act. *Id.* at 20.

[2187] *In re: Regulations for Competition in the Local Telecommunications Market,* Docket U-200883 (Louisiana Commission March 15, 1996).

[2188] *Wholesale Rates for Telecommunications Services Ruling on AT&T's Petition for a Reduction on the Wholesale Rates of Bell Atlantic–Maryland, Inc.*, Case No. 8721 (Maryland Commission June 27, 1996).

[2189] *Joint Complaint of AT&T Communications of New York, Inc., MCI Telecommunications Corporation, WorldCom, Inc. d/b/a LDDS WorldCom and the Empire Association of Long Distance Telephone Companies, Inc. Against New York Telephone Company Concerning Wholesale Provisioning of Local Exchange Service by New York Telephone Company and Sections of New York Telephone's Tariff No. 900*, Case 95-C-0657 (New York Commission July 18, 1996); *Petition of Rochester Telephone Corp. for Approval of a Proposed Restructuring Plan*, Case 93-C-0103 (New York Commission July 18, 1996).

network support expense. For marketing categories, 20 percent of product management, 50 percent of sales, and 50 percent of advertising expenses were considered avoidable. All uncollectibles were considered avoidable. Calculating these and other avoided costs, the New York Commission arrived at a 15 percent discount. Because the New York Commission observed that business lines produce higher overall revenue and thus artificially inflate avoided cost for business lines (and undervalue the avoided cost for residential lines), a 17 percent discount was set for residential service while only an 11 percent discount was set for business service. A uniform 13.5 percent discount was ordered for Rochester Telephone, based on a New York Commission analysis of Rochester's 1995 annual report, using principles similar to those applied to NYNEX.

906. *Ohio*: The Ohio Commission has established rules for pricing wholesale services for resale, but has not publicly released calculations of specific discounts for particular services.[2190] The Ohio Commission established a presumption that all expenses contained in the following USOA accounts will be avoided: 5300 (uncollectible revenue), 6611 (product management), 6612 (sales), 6613 (product advertising), 6621 (call completion service), 6622 (number services expense), and 6623 (customer service).[2191] The Ohio Commission's rules require resellers seeking to avoid additional costs to prove that such costs would be avoided in wholesale operations. Beyond the avoided expenses discussed above, the Ohio Commission requires avoided costs to include "direct and indirect costs of all activities eliminated due to the wholesale provisioning."

5. Discussion

907. Resale will be an important entry strategy for many new entrants, especially in the short term when they are building their own facilities. Further, in some areas and for some new entrants, we expect that the resale option will remain an important entry strategy over the longer term. Resale will also be an important entry strategy for small businesses that may lack capital to compete in the local exchange market by purchasing unbundled elements or by building their own networks. In light of the strategic importance of resale to the development of competition, we conclude that it is especially important to promulgate national rules for use by state commissions in setting wholesale rates. For the same reasons discussed in Section II.D of the Order, we believe that we have legal authority under the 1996 Act to articulate principles that will apply to the arbitration or review of wholesale rates. We also believe that articulating such principles will promote expeditious and efficient entry into the local exchange market. Clear resale rules will create incentives for parties to reach agreement on resale arrangements in voluntary negotiations. Clear rules will also aid states in conducting arbitrations that will be administratively workable

---

[2190] *Commission Investigation Relative to the Establishment of Local Exchange Competition and Other Competitive Issues*, Case No. 95-845-TP-COI (Ohio Commission June 12, 1996).

[2191] The Ohio Commission also lists account 6610, which is the summary account for marketing expenses (accounts 6611-6613).

and will produce results that satisfy the intent of the 1996 Act. The rules we adopt and the determinations we make in this area are crafted to achieve these purposes. We also note that clear resale rules should minimize regulatory burdens and uncertainty for all parties, including small entities and small incumbent LECs.[2192]

908. The statutory pricing standard for wholesale rates requires state commissions to (1) identify what marketing, billing, collection, and other costs will be avoided by incumbent LECs when they provide services at wholesale; and (2) calculate the portion of the retail prices for those services that is attributable to the avoided costs. Our rules provide two methods for making these determinations. The first, and preferred, method requires state commissions to identify and calculate avoided costs based on avoided cost studies. The second method allows states to select, on an interim basis, a discount rate from within a default range of discount rates adopted by this Commission. They may then calculate the portion of a retail price that is attributable to avoided costs by multiplying the retail price by the discount rate.

909. We adopt a minimum set of criteria for avoided cost studies used to determine wholesale discount rates. The record before us demonstrates that avoided cost studies can produce widely varying results, depending in large part upon how the proponent of the study interprets the language of section 252(d)(3). The criteria we adopt are designed to ensure that states apply consistent interpretations of the 1996 Act in setting wholesale rates based on avoided cost studies which should facilitate swift entry by national and regional resellers, which may include small entities.[2193] At the same time, our criteria are intended to leave the state commissions broad latitude in selecting costing methodologies that comport with their own ratemaking practices for retail services. Thus, for example, our rules for identifying avoided costs by USOA expense account are cast as rebuttable presumptions, and we do not adopt as presumptively correct any avoided cost model.

910. Based on the comments filed in this proceeding and on our analysis of state decisions setting wholesale discounts, we adopt a default range of rates that will permit a state commission to select a reasonable default wholesale rate between 17 and 25 percent below retail rate levels. A default wholesale discount rate shall be used if: (1) an avoided cost study that satisfies the criteria we set forth below does not exist; (2) a state commission has not completed its review of such an avoided cost study; or (3) a rate established by a state commission before release of this Order is based on a study that does not comply with the criteria described in the following section. A state commission must establish wholesale rates based on avoided cost studies within a reasonable time from when the default rate was selected. This approach will enable state commissions to complete arbitration proceedings within the statutory time frames even if it is infeasible to conduct full-scale avoided cost studies that comply with the criteria

[2192] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

[2193] *See Id.*

described below for each incumbent LEC.

a. Criteria for Cost Studies

911. There has been considerable debate on the record in this proceeding and before the state commissions on whether section 252(d)(3) embodies an "avoided" cost standard or an "avoidable" cost standard. We find that "the portion [of the retail rate] . . . attributable to costs that will be avoided" includes all of the costs that the LEC incurs in maintaining a retail, as opposed to a wholesale, business. In other words, the avoided costs are those that an incumbent LEC would no longer incur if it were to cease retail operations and instead provide all of its services through resellers. Thus, we reject the arguments of incumbent LECs and others who maintain that the LEC must actually experience a reduction in its operating expenses for a cost to be considered "avoided" for purposes of section 252(d)(3). We do not believe that Congress intended to allow incumbent LECs to sustain artificially high wholesale prices by declining to reduce their expenditures to the degree that certain costs are readily avoidable. We therefore interpret the 1996 Act as requiring states to make an objective assessment of what costs are reasonably avoidable when a LEC sells its services wholesale. We note that Colorado, Georgia, Illinois, New York, and Ohio commissions have all interpreted the 1996 Act in this manner.[2194]

912. We find that, under this "reasonably avoidable" standard discussed above, an avoided cost study must include indirect, or shared, costs as well as direct costs. We agree with MCI, AT&T, and the California, Illinois, Ohio, Colorado, and Georgia commissions that some indirect or shared costs are avoidable and likely to be avoided when a LEC provides retail services to a reseller instead of to the end user. This is because indirect or shared costs, such as general overheads, support all of the LEC's functions, including marketing, sales, billing and collection, and other avoided retail functions. Therefore, a portion of indirect costs must be considered "attributable to costs that will be avoided" pursuant to section 252(d)(3). It is true that expenses recorded in indirect or shared expense accounts will continue to be incurred for wholesale operations. It is also true, however, that the overall level of indirect expenses can reasonably be

---

[2194] *See, e.g., U S West Communications, Inc. Filing Advice Letter No. 2610 in Compliance with Commission Decision No. C96-521 Adopting Emergency Rules*, Docket No. 96S-233T (Colorado Commission June 21, 1996) at paras. 12-13; *Petition of AT&T for the Commission to Establish Resale Rules, Rates, Terms, and Conditions and Initiate Unbundling of Services*, Docket No. 6352U (Georgia Commission June 21, 1996); *Petition for a Total Local Exchange Wholesale Service Tariff from Illinois Bell Telephone Company*, Nos. 95-0458 and 95-0531 (consol.) (Illinois Commission June 26, 1996) at 27-34; *Joint Complaint of AT&T Communications of New York, Inc., MCI Telecommunications Corporation, WorldCom, Inc. d/b/a LDDS WorldCom and the Empire Association of Long Distance Telephone Companies, Inc. Against New York Telephone Company Concerning Wholesale Provisioning of Local Exchange Service by New York Telephone Company and Sections of New York Telephone's Tariff No. 900*, Case 95-C-0657 (New York Commission July 18, 1996); *Petition of Rochester Telephone Corp. for Approval of a Proposed Restructuring Plan*, Case 93-C-0103 (New York July 18, 1996); *Commission Investigation Relative to the Establishment of Local Exchange Competition and Other Competitive Issues*, Case No. 95-845-TP-COI (Ohio Commission June 12, 1990) at 30-31.

expected to decrease as a result of a lower level of overall operations resulting from a reduction in retail activity.

913. A portion of contribution, profits, or mark-up may also be considered "attributable to costs that will be avoided"[2195] when services are sold wholesale. MCI's model makes this attribution by means of a calculation that applies the same mark-up to wholesale services as to retail services. The Illinois Commission achieved a similar effect by removing a *pro rata* portion of contribution from the retail rate for each service. In AT&T's model, the portion of return on investment (profits) that was attributable to assets used in avoided retail activities was treated as an avoided cost. We find that these approaches are consistent with the 1996 Act.

914. An avoided cost study may not calculate avoided costs based on non-cost factors or policy arguments, nor may it make disallowances for reasons not provided for in section 252(d)(3). The language of section 252(d)(3) makes no provision for selecting a wholesale discount rate on policy grounds. We therefore reject NCTA's argument that discount rates should be ten percent or less in order to avoid discouraging facilities-based competition, as well as AT&T's suggestion that wholesale discount rates should be set at levels that ensure the viability of the reseller's business. We also reject, for example, MCI's assertion that no external relations or research and development costs should be allowed in wholesale rates because the activities represented by those costs are contrary to the interests of the LEC competitors that purchase wholesale services.[2196] Our analysis also precludes a state commission from adopting AT&T's suggestion that an increment should be added to the base discount rate to compensate resellers for alleged deficiencies in the provisioning of services.

915. The 1996 Act requires that wholesale rates be based on existing retail rates, and thus clearly precludes use of a "bottom up" TSLRIC study to establish wholesale rates that are not related to the rates for the underlying retail services. We thus reject the suggestions of those parties that ask us to require use of TSLRIC to set wholesale rates. The 1996 Act does not, however, preclude use of TSLRIC cost studies to identify the portion of a retail rate that is attributable to avoided retail costs. TSLRIC studies would be entirely appropriate in states where the retail rates were established using a TSLRIC method. For example, the Illinois Commission calculated its wholesale rate using an avoided cost formula and long run incremental cost studies. Embedded cost studies, such as the studies used by the Georgia Commission, may also be used to identify avoided costs. Ideally, a state would use a study methodology that is consistent with the manner in which it sets retail rates.

916. We neither prohibit nor require use of a single, uniform discount rate for all of an incumbent LEC's services. We recognize that a uniform rate is simple to apply, and avoids the

---

[2195] 47 U.S.C. § 252(d)(3).

[2196] *See* MCI comments at Attachment 2 (Pricing of Wholesale Services), p. 6-7.

need to allocate avoided costs among services. Therefore, our default wholesale discount is to be applied uniformly. On the other hand, we also agree with parties who observe that avoided costs may, in fact, vary among services. Accordingly, we allow a state to approve nonuniform wholesale discount rates, as long as those rates are set on the basis of an avoided cost study that includes a demonstration of the percentage of avoided costs that is attributable to each service or group of services.

917. All costs recorded in accounts 6611 (product management), 6612 (sales), 6613 (product advertising) and 6623 (customer services) are presumed to be avoidable. The costs in these accounts are the direct costs of serving customers. All costs recorded in accounts 6621 (call completion services) and 6622 (number services) are also presumed avoidable, because resellers have stated they will either provide these services themselves or contract for them separately from the LEC or from third parties. These presumptions regarding accounts 6611-6613 and 6621-6623 may be rebutted if an incumbent LEC proves to the state commission that specific costs in these accounts will be incurred with respect to services sold at wholesale, or that costs in these accounts are not included in the retail prices of the resold services.

918. General support expenses (accounts 6121-6124), corporate operations expenses (accounts 6711, 6712, 6721-6728), and telecommunications uncollectibles (account 5301) are presumed to be avoided in proportion to the avoided direct expenses identified in the previous paragraph. Expenses recorded in these accounts are tied to the overall level of operations in which an incumbent LEC engages. Because the advent of wholesale operations will reduce the overall level of operations -- for example, staffing should decrease because customer inquiries and billing and collection activity will decrease -- overhead and support expenses are in part avoided. We select the revenue offset account of 5301 rather than accounts 5300 or 6790 because account 5301 most directly represents overheads attributable to the services being resold.

919. Plant-specific and plant non-specific expenses (other than general support expenses) are presumptively not avoidable.

920. In the case of carriers designated as Class B under section 32.11 of our rules that use certain summary accounts in lieu of accounts designated in this subsection of the Order, our avoided cost study criteria shall apply to the relevant summary account in its entirety.[2197]

b. Default Range of Wholesale Discount Rates

921. Parties to this proceeding present evidence or arguments supporting wholesale discount rates ranging from 4.76 percent to 55 percent:

[2197] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

Sprint/United Telephone study	
Simple Access service:	4.76%
Other services:	7.19%
NCTA	10.0%
Comcast	10.0%
Massachusetts Attorney General	25.0%
ACTA	25.0%
MCI Model	25.6-33.2%[2198]
Telecommunications Resellers Ass'n	30.0-50.0%
AT&T Model	23.05%-55.52%[2199]

922. States applying wholesale pricing standards similar to the standards in section 252(d)(3) have set the following wholesale discounts:

California	
PacTel	
Business	17.0%
Residential	10.0%
GTE	
Business	12.0%
Residential	7.0%
Colorado	
Residential	9.0%
Business	16.0%
Toll Services	30.0%
Central Office-Based Features	50.0%[2200]
All other services	18.0%
Georgia	
Residential	20.3%
Business	17.3%

[2198] MCI calculated rates based on actual accounting data for the years 1990-1995 for each RBOC and for GTE. For 1995 the rates ranged from 25.6 percent for U S West to 33.2 percent for Ameritech. MCI also calculates rates for 1996 using estimated data. MCI comments at Attachment 2 (Pricing of Wholesale Services), p. 1.

[2199] AT&T calculated separate discount rates for each RBOC study area and for SNET and GTE Hawaiian Tel.

[2200] Central office-based services are custom calling features such as speed dialing and CLASS features, such as caller ID. *U S West Communications, Inc. Filing Advice Letter No. 2610 in Compliance with Commission Decision No. C96-521 Adopting Emergency Rules*, Docket No. 96S-233T (Colorado Commission June 21, 1996) at para. 13.

Illinois	20.07%[2201]
New York	
NYNEX	
Business	17.0%
Residential	11.0%
Rochester Telephone	13.5%

923. We find unpersuasive various arguments presented by parties at the lower and higher ends of the range of possible discounts. The Sprint/United Telephone study produces unreasonably low measures of avoided costs because the study considers only avoided direct expenses in five accounts. As explained above, we interpret the statutory language providing for a wholesale price that excludes the "portion [of a retail rate] attributable to any marketing, billing, collection, and other costs that will be avoided"[2202] to include indirect as well as direct costs. The proposals of NCTA and Comcast for a maximum discount of 10 percent are premised on the view that any greater discount would unduly discourage facilities-based competition. Section 252(d)(3), however, requires wholesale prices to be set based on avoided costs, not on any policy preference for facilities-based competition. For the same statutory reason, we reject as inconsistent with section 252(d)(3) the policy arguments of the Telecommunications Resellers Association and AT&T that we should establish national wholesale discounts at levels that will ensure that resale of local exchange services is a viable business.[2203]

924. We find AT&T's model unsuitable for purposes of establishing in this proceeding a range for default wholesale discount rates. The AT&T model does in many respects satisfy the general criteria we establish above for avoided cost studies. The model, however, incorporates numerous assumptions, cost allocation factors, and studies, and because AT&T submitted its model with its reply comments, and other parties have not analyzed the model in detail. We find that we would need to develop a more complete record on the AT&T model before deciding whether to endorse it. We do not, however, preclude a state commission from considering in a wholesale rate proceeding evidence developed using this model.

925. We find that we can use MCI's model, with some modifications, along with the results of certain state proceedings, to establish a range of rates that would produce an acceptable default wholesale discount rate that reasonably approximates the amount of avoided costs that should be subtracted from the retail rate. A default rate is to be used only in three instances: (1)

[2201] The Illinois Commission requires wholesale discounts to be computed on a service-specific basis. The 20.07 percent figure represents an "average" discount using such a methodology.

[2202] 47 U.S.C. § 252(d)(3).

[2203] *See* AT&T comments at 81-86; Telecommunications Resellers Ass'n comments at 24.

in a state arbitration proceeding if an avoided cost study that satisfies the criteria we set forth above does not exist; (2) where a state has not completed its review of such an avoided cost study; (3) where a rate established by a state before the release date of this Order is based on a study that does not comply with the criteria described in the previous section. We emphasize that the default rate is to be used as an interim measure only, and should be replaced with an avoided cost study within a reasonable time. The MCI model is a reasonable attempt at estimating avoided cost in accordance with section 252(d)(3) using only publicly-available data. We find, however, that we should modify certain features of the model.

926. First, MCI treats account 6722 (external relations) and account 6727 (research and development) as avoidable costs. MCI argues that purchasers of wholesale services are competing with LECs and, therefore, should not be forced to fund regulatory activities reflected in account 6722. MCI claims that research and development are not of practical use for the services that resellers will purchase. As explained above, this type of disallowance is not contemplated by the avoided cost standard of section 252(d)(3). We therefore adjust the model to treat these costs in the same manner as other overhead expense accounts.

927. Second, MCI treats a number of accounts as "other avoided costs" on the grounds that the expenses in those accounts are not relevant to the provision of telecommunications services that an incumbent LEC currently provides.[2204] Public telephone terminal equipment expense and large PBX expense are not "avoided" precisely because they are unrelated to the retail services being discounted. We would not expect these expenses to be included in retail service rates for resold services; but if these expenses were included in retail rates, they would not be avoided when the services are purchased by resellers. The rest of MCI's "other" accounts contain costs that support all of the telecommunications services offered by the company. MCI has not shown that any of these costs are either reduced or eliminated when services are sold at wholesale. We, therefore, adjust the MCI model so as not to treat these accounts as avoidable costs.

928. Third, MCI treats accounts 6611 (product management), 6612 (sales), 6613 (product advertising), and 6623 (customer services) as costs that are entirely avoided with respect to services purchased at wholesale. We agree that a large portion of the expenses in these accounts is avoided when service is sold at wholesale. We also agree, however, with parties that argue that some expenses in these accounts will continue to be incurred with respect to wholesale products and customers, and that some new expenses may be incurred in addressing the needs of resellers as customers. No party in this proceeding has suggested a specific adjustment to the MCI model that would account for these costs of the wholesale operation. We note that, in their

[2204] Based on this rationale, MCI excludes account 6113 (aircraft expense), account 6341 (large PBX expense), account 6511 (property held for future telecommunications use expense), account 6351 (public telephone terminal equipment expense), account 6512 (provisioning expense), account 6562 (depreciation expense for property held for future telecommunications use), and account 6564 (amortization expense, intangible).

own proceedings, several states have made varying estimates concerning the level of wholesale-related expenses in these accounts. Colorado, for example, estimated that none of the costs in accounts 6611-6613 would relate to wholesale services, and that only five percent of the costs in account 6623 would be incurred in a wholesale operation.[2205] The Georgia Commission, on the other hand, decided that 25 percent of sales and product advertising expenses would continue to be incurred in the wholesale operation.[2206] Given the lack of evidence, and the wide range of estimates that have been made by these states, we find it reasonable to assume, for purposes of determining a default range of wholesale discount rates, that ten percent of costs in accounts 6611, 6612, 6613, and 6623 are not avoided by selling services at wholesale.

929. Fourth, MCI uses a complex formula to calculate the portions of overhead and general support expense that are attributable to avoided costs. We find that this formula is constructed in a way that tends to inflate the results of the calculation. We have, therefore, substituted a more straightforward approach in which we apply to each indirect expense category the ratio of avoided direct expense to total expenses. We also identify a slightly different list of accounts representing indirect costs than that proposed by MCI.

930. With the modifications described above, and using actual 1995 data, MCI's model produces the following results for the RBOCs and GTE:

U S West	18.80%
GTE	18.81%
BellSouth	19.20%
Bell Atlantic	19.99%
SBC	20.11%
NYNEX	21.31%
Pacific	23.87%
Ameritech	25.98%

931. We also take into account the experience of those state commissions, Illinois and Georgia, that have undertaken or approved detailed avoided cost studies under the pricing standard of section 252(d)(3) of the 1996 Act. Applying the statutory standard to the examination of significant cost studies, those commissions derived average wholesale discounts of

---

[2205] *U S West Communications, Inc. Filing Advice Letter No. 2610 in Compliance with Commission Decision No. C96-521 Adopting Emergency Rules*, Docket No. 96S-233T (Colorado Commission June 21, 1996) at para. 12 and n.20. The Colorado Commission explained that it chose 5 percent because "some small portion of customer services will remain for the interfaces of Operational Support Systems of [U S West] and the resellers, but nowhere near the amount necessary for direct customer contact services." *Id.* n.20.

[2206] *Petition of AT&T for the Commission to Establish Resale Rules, Rates, Terms, and Conditions and Initiate Unbundling of Services*, Docket No. 6352U (Georgia Commission June 21, 1996) at Appendix 1. The Georgia Commission characterized its calculations with respect to sales expense as "conservative at best."

18.74 percent[2207] and 20.07 percent. We find that these decisions present evidence of an appropriate wholesale discount that should be given more weight than state commission decisions that have set their discounts under other pricing standards or only on an interim basis.[2208]

932. Accordingly, based on the record before us, we establish a range of default discounts of 17-25 percent that is to be used in the absence of an avoided cost study that meets the criteria set forth above. A state commission that has not set wholesale prices based on avoided cost studies that meet the criteria set forth above as of the release date of this Order shall use a default wholesale discount rate between 17 and 25 percent. A state should articulate the basis for selecting a particular discount rate. If this default discount rate is used, the state commission must establish wholesale rates based on avoided cost studies within a reasonable time. The avoided cost study must comply with the criteria for avoided cost studies described above. A state commission may submit an avoided cost study to this Commission for a determination of whether it complies with these criteria. If a party (either a reseller or an incumbent LEC) believes that a state commission has failed to act within a reasonable period of time, that party may file a petition for declaratory ruling with this Commission, asking us to determine whether the state has failed to comply with this rule. We will, in making such determinations, consider the particular circumstances in the state involved. If a state commission has adopted as of the release date of this Order an interim wholesale pricing decision that relies on an avoided cost study that meets the criteria set forth above, the state commission may continue to require an incumbent LEC to offer services for resale under such interim wholesale prices in lieu of the default discount range, so long as the state commission's interim pricing rules are fully enforceable by resellers and followed by a final decision within a reasonable period of time that adopts an avoided cost study that meets the criteria set forth above.

933. We select the 17 to 25 percent range of default discounts based on our evaluation of the record. The adjusted results of the MCI model taken together with the results of those state proceedings discussed above that indicated they applied the statutory standard produces, a range between 18.74 and 25.98 percent. A majority of these wholesale discount rates fall between 18.74 and 21.11 percent. Other state commissions, such as California and New York, that have

---

[2207] Prior to apportioning avoided costs between business and residential services, the Georgia Commission's avoided cost computation would have yielded an aggregate wholesale discount rate of 18.74 percent. This figure is computed by dividing the total avoided costs computed by the Georgia Commission by the total BellSouth residential and business revenues (which were used individually both to apportion total avoided costs between residential and business service and as the denominator in the final wholesale discount calculations).

[2208] *See, e.g., Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service*, R. 95-04-043 and I. 95-04-044 (California Commission April 26, 1996); *U S West Communications, Inc. Filing Advice Letter No. 2610 in Compliance with Commission Decision No. C96-521 Adopting Emergency Rules*, Docket No. 96S-233T (Colorado Commission June 21, 1996); *Wholesale Rates for Telecommunications Services Ruling on AT&T's Petition for a Reduction on the Wholesale Rates of Bell Atlantic–Maryland, Inc.*, Case No. 8721 (Maryland Commission June 27, 1996).

employed avoided cost studies have produced wholesale discount rates somewhat below the low end of this range. Furthermore, it has been argued that smaller incumbent LECs' avoided costs are likely to be less than those of the larger incumbent LECs, whose data was used by MCI. Therefore, to allow for these considerations, we select 17 percent as the lower end of the range.[2209] We select 25 percent as the top of the range because it approximates the top of the range of results produced by the modified MCI model. This range gives state commissions flexibility in addressing circumstances of incumbent LECs serving their states and permits resale to proceed until such time as the state commission can review a fully-compliant avoided cost study.

934. We have considered the economic impact of our rules in this section on small incumbent LECs. For example, Bay Springs, *et al.*, argues that national wholesale pricing rules will insufficiently consider operational differences between small and large incumbent LECs.[2210] We take this into consideration in setting the default discount rate and in requiring state commissions to perform carrier-specific avoided cost studies within a reasonable period of time that will reflect carrier-to-carrier differences. We believe, however, that the procompetitive goals of the 1996 Act require us to establish a default discount rate for state commissions to use in the absence of avoided cost studies that comply with the criteria we set forth above. The presumptions we establish in conducting avoided cost studies regarding the avoidability of certain expenses may be rebutted by evidence that certain costs are not avoided, which should minimize any economic impact of our decisions on small incumbent LECs. We also note that certain small incumbent LECs are not subject to our rules under section 251(f)(1) of the 1996 Act, unless otherwise determined by a state commission, and certain other small incumbent LECs may seek relief from their state commissions from our rules under section 251(f)(2) of the 1996 Act.

C. Conditions and Limitations

935. Section 251(c)(4) requires incumbent LECs to make their services available for resale without unreasonable or discriminatory conditions or limitations. This portion of this Order addresses various issues relating to conditions or limitations on resale. It first discusses restrictions, generally, in Section VIII.C.1. Next, it turns to promotional and discounted offerings and the conditions that may attach to such offerings in Section VIII.C.2., and then to refusals to resell residential and below-cost services in Section VIII.C.3. Limitations on the categories of customers to whom a reseller may sell incumbent LEC services are discussed in VIII.C.4. Resale restrictions in the form of withdrawal of service are discussed in VIII.C.5. Finally, Section VIII.C.6. discusses resale restrictions relating to provisioning.

1. Restrictions, Generally, and Burden of Proof

[2209] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

[2210] Bay Springs, *et al.*, comments at 17.

a. Background and Comments

936. In the NPRM, we asked whether incumbent LECs should have the burden of proving that restrictions on resale are reasonable and nondiscriminatory.[2211] We stated our belief that, given the pro-competitive goals of the 1996 Act and the view that restrictions and conditions were likely to be evidence of an exercise of market power, the range of permissible restrictions should be quite narrow.[2212]

937. A number of parties, including IXCs, resellers, and some state commissions, agree that incumbent LECs should have the burden of justifying any restrictions they impose on the resale of their services.[2213] For example, Jones Intercable proposes a requirement that incumbent LECs prove that a proposed condition or restriction will directly advance an important public policy objective and that the benefits of the condition plainly outweigh its anticompetitive effects.[2214] Many add the caveat that the only permissible restriction should be the cross-class restriction, section 251(c)(4)(B), prohibiting resellers that obtain at wholesale rates telecommunications services that are available at retail only to a category of subscribers from offering such services to a different category of subscribers.[2215] The Texas Public Utility Counsel suggests that the relevant determination is whether an incumbent LEC could impose the condition in question in a competitive market.[2216]

938. Incumbent LECs support various restrictions and limitations.[2217] BellSouth and the Ohio Consumers' Counsel further suggest that the burden of justifying restrictions and limitations

---

[2211] NPRM at para. 175.

[2212] *Id.*

[2213] *See, e.g.*, ACSI comments at 60; California Commission comments at 35-37; CFA/CU comments at 17; Citizens Utilities comments at 27; Colorado Commission comments at 52-53; Jones Intercable comments at 24; MFS comments at 70; NEXTLINK comments at 30; Pennsylvania Commission comments at 36; Ohio Commission comments at 62; TCC comments at 43; Telecommunications Resellers Ass'n comments at 20; Washington Commission comments at 32.

[2214] Jones Intercable comments at 32-33.

[2215] *See, e.g.*, CFA/CU comments at 17; Citizens Utilities at 27; Colorado Commission comments at 52-53; TCC comments at 43. Many of these parties offer a narrow interpretation of section 251(c)(4)(B), which will be discussed, *infra*.

[2216] Texas Public Utilities Counsel reply at 42.

[2217] *See, e.g.*, BellSouth comments at 66.

should not be placed on LECs.[2218]

b. Discussion

939. We conclude that resale restrictions are presumptively unreasonable. Incumbent LECs can rebut this presumption, but only if the restrictions are narrowly tailored. Such resale restrictions are not limited to those found in the resale agreement. They include conditions and limitations contained in the incumbent LEC's underlying tariff. As we explained in the NPRM, the ability of incumbent LECs to impose resale restrictions and conditions is likely to be evidence of market power and may reflect an attempt by incumbent LECs to preserve their market position. In a competitive market, an individual seller (an incumbent LEC) would not be able to impose significant restrictions and conditions on buyers because such buyers turn to other sellers. Recognizing that incumbent LECs possess market power, Congress prohibited unreasonable restrictions and conditions on resale. We, as well as state commissions, are unable to predict every potential restriction or limitation an incumbent LEC may seek to impose on a reseller. Given the probability that restrictions and conditions may have anticompetitive results, we conclude that it is consistent with the procompetitive goals of the 1996 Act to presume resale restrictions and conditions to be unreasonable and therefore in violation of section 251(c)(4). This presumption should reduce unnecessary burdens on resellers seeking to enter local exchange markets, which may include small entities, by reducing the time and expense of proving affirmatively that such restrictions are unreasonable.[2219] We discuss several specific restrictions below including certain restrictions for which we conclude the presumption of unreasonableness shall not apply. We also discuss certain restrictions that we will presume are reasonable.

2. Promotions and Discounts

a. Background and Comments

940. In the NPRM, we asked whether an incumbent LEC's obligation to make their services available for resale at wholesale rates applies to discounted and promotional offerings and, if so, how.[2220] We also asked, if the wholesale pricing obligation applies to promotions and discounts, whether the reseller entrant's customer must take service pursuant to the same restrictions that apply to the incumbent LEC's retail customers.[2221]

[2218] BellSouth comments at 65; Ohio Consumers' Counsel comments at 35.

[2219] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

[2220] NPRM at para. 175.

[2221] *Id.*

941. Incumbent LECs and Time Warner argue that they should not be required to offer discounted and promotional offerings at wholesale rates.[2222] These parties argue that promotions and discounts are merely subsets of standard offerings, or that promotions and discounts are only devices for marketing underlying "telecommunications services."[2223] Thus, these parties argue, a discounted and promotional offering is not in itself a "telecommunications service" that is subject to the resale requirement as long as the standard offering is made available for resale at wholesale rates.[2224]

942. Incumbent LECs argue that requiring promotions and discounts to be made available at wholesale rates will discourage such offerings. According to incumbent LECs, promotions and discounts serve as a means by which incumbent LECs differentiate their services from resellers' offerings.[2225] Furthermore, they contend that establishing a system where resellers' service and pricing options track incumbent LECs' promotions and discounts would promote collusion rather than competition.[2226] SBC notes that resellers will have access to volume discounts (through aggregating) that will allow them to compete with promotions and discounts offered by incumbent LECs.[2227] Incumbent LECs argue that many promotions, such as offering installation at no charge for new customers for limited periods, are short-term and used as marketing tools.[2228] Some parties suggest that the wholesale rate obligation should, at least, not attach to offerings that are only available for a limited period of time.[2229] Specifically, some parties recommend that we not permit incumbent LECs not to offer wholesale rates for offerings that are only available for 120 days or less.[2230]

[2222] *See, e.g.*, Ameritech comments at 57; Bell Atlantic comments at 46; MECA comments at 60; NYNEX comments at 76; SNET comments at 34; Time Warner comments at 73; U S West comments at 67; USTA comments at 72. Some parties commented only with respect to promotional offerings. *See, e.g.*, BellSouth comments at 66; Cincinnati Bell comments at 34; PacTel comments at 87; SBC comments at 72.

[2223] *See, e.g.*, Ameritech comments at 57; NYNEX comments at 76.

[2224] *See, e.g.*, Bell Atlantic reply at 23-24; GTE comments at 50; MECA comments at 60; NYNEX comments at 76; Time Warner comments at 73.

[2225] *See, e.g.*, BellSouth comments at Attachment (Interconnection and Economic Efficiency), p. 22; Cincinnati Bell comments at 33; USTA comments at Attachment (Affidavit of Jerry Hausman), p.14.

[2226] GTE comments at 50.

[2227] SBC comments at 72-73.

[2228] *See, e.g.*, NYNEX comments at 76 (promotions are merely short term waivers of nonrecurring charges).

[2229] Ameritech comments at 56-57; GTE reply at 27 n.49; Ohio Consumer's Counsel comments at 36; PacTel reply at 45.

[2230] *See, e.g.*, Ameritech comments at 57.

943. Some parties also contend that section 251(c)(4) resale obligations should not apply to contract,[2231] trial,[2232] or community service offerings.[2233] GTE and U S West argue that high volume rate offerings should not be subject to the wholesale rate obligation because they are already discounted.[2234] Ameritech and Bell Atlantic argue that contract offerings are not subject to resale because they are not made generally available.[2235]

944. IXCs, resellers, and DoJ argue that if incumbent LECs are not required to offer promotions and other discounts at wholesale rates, incumbent LECs will be able to undercut rates that resellers offer.[2236] They contend that services, classes of customers, or even individual customers could be strategically targeted by the incumbent LECs.[2237] The Telecommunications Resellers Association and others argue that price reductions that are designed to drive competitors from the market do not produce long-term gains for consumers.[2238] The Ohio Consumers' Counsel argues that, if the Commission were to exempt short-term promotional offerings, 120 days is too long to be considered short-term.[2239] IXCs and resellers contend that contract offerings should be made available for resale.[2240]

945. Incumbent LECs, some state commissions, and the Ohio Consumers' Counsel argue that if promotions and discounts are subject to wholesale pricing, reseller end-users must take

---

[2231] BellSouth comments at 66; USTA comments at 72.

[2232] Bell Atlantic reply at 23-24; SBC comments at 71; USTA comments at 72.

[2233] J. Staurulakis comments at 7. LDDS advocates that resale of community service offerings be limited to the class of subscribers eligible to receive such offerings. LDDS comments at 84.

[2234] GTE comments at 49-50; U S West comments at 68.

[2235] Ameritech reply at 47; Bell Atlantic reply at 24.

[2236] *See, e.g.*, AT&T comments at 83; Cable & Wireless comments at 37; Telecommunications Resellers Ass'n reply at 13; DoJ comments at 54-55. For this reason, the Washington Commission made its support of promotional and discount resale restrictions contingent on rules that would prevent incumbent LECs from pricing such offerings below rates offered to resellers. Washington Commission comments at 32.

[2237] *See, e.g.*, Telecommunications Resellers Ass'n reply at 13.

[2238] Telecommunications Resellers Ass'n reply at 13.

[2239] Ohio Consumers' Counsel reply at 30.

[2240] *See, e.g.*, LDDS reply at 43; Telecommunications Resellers Ass'n reply at 14.

such promotions and discounts under the same conditions as incumbent LEC end users.[2241] Resellers argue, however, that incumbent LECs will use this latitude to engage in anticompetitive practices by creating conditions that will have an unnecessarily greater impact on typical reseller end users than incumbent LEC end users.[2242]

946. Incumbent LECs also seek to limit reseller end user eligibility to purchase resold incumbent LEC high-volume offerings to those eligible to receive such offerings directly from the incumbent LEC.[2243] Such a limitation would prevent high-volume services from being resold to low-volume customers. MFS argues that such restrictions should be considered per se unreasonable because this is a significant source of the resellers' competitive advantage.[2244] The Ohio and Pennsylvania Commissions also support resellers' rights to aggregate low volume customers to take advantage of the resulting buying power.[2245]

947. U S West generally argues that resellers should make the same type of purchasing commitments made by current purchasers of wholesale services.[2246] Often, U S West argues, wholesalers are required to concentrate their purchases on services from a limited number of switches in order to receive volume discounts. U S West argues that incumbent LECs should be allowed to require the same types of commitments from resellers purchasing such services.[2247] U S West and GTE propose allowing incumbent LECs to impose term requirements on resold offerings.[2248] Cable & Wireless opposes both of these requirements and suggests that they be made presumptively unreasonable.[2249]

[2241] *See, e.g.*, SBC reply at 15 n.34, PacTel comments at 45 n.95; Alabama Commission comments at 26; Ohio Consumers' Counsel comments at 35-36.

[2242] *See, e.g.*, Cable & Wireless comments at 42; Telecommunications Resellers Ass'n comments at 19 n.50.

[2243] *See, e.g.*, GTE comments at 49-50; California Commission comments at 35-37; PacTel reply at 45 n.95.

[2244] MFS comments at 70.

[2245] Ohio Commission comments at 65; Pennsylvania Commission comments at 36. The Ohio Commission, however, specifically states that it is opposed to federal rules on this subject. Ohio Commission at 65.

[2246] U S West comments at 67.

[2247] *Id.*

[2248] U S West comments at 67; GTE comments at 47.

[2249] Cable & Wireless comments at 48-49.

b. Discussion

948. Section 251(c)(4) provides that incumbent LECs must offer for resale at wholesale rates "any telecommunications service" that the carrier provides at retail to noncarrier subscribers. This language makes no exception for promotional or discounted offerings, including contract and other customer-specific offerings. We therefore conclude that no basis exists for creating a general exemption from the wholesale requirement for all promotional or discount service offerings made by incumbent LECs. A contrary result would permit incumbent LECs to avoid the statutory resale obligation by shifting their customers to nonstandard offerings, thereby eviscerating the resale provisions of the 1996 Act. In discussing promotions here, we are only referring to price discounts from standard offerings that will remain available for resale at wholesale rates, *i.e.*, temporary price discounts.[2250]

949. There remains, however, the question of whether all short-term promotional prices are "retail rates" for purposes of calculating wholesale rates pursuant to section 252(d)(3). The 1996 Act does not define "retail rate;" nor is there any indication that Congress considered the issue. In view of this ambiguity, we conclude that "retail rate" should be interpreted in light of the pro-competitive policies underlying the 1996 Act. We recognize that promotions that are limited in length may serve procompetitive ends through enhancing marketing and sales-based competition and we do not wish to unnecessarily restrict such offerings. We believe that, if promotions are of limited duration, their procompetitive effects will outweigh any potential anticompetitive effects. We therefore conclude that short-term promotional prices do not constitute retail rates for the underlying services and are thus not subject to the wholesale rate obligation.

950. We must also determine when a promotional price ceases to be "short term" and must therefore be treated as a retail rate for an underlying service. Incumbent LEC commenters support 120 days as the maximum period for such promotions. This has been criticized as being too long. We are concerned that excluding promotions that are offered for as long as four months may unreasonably hamper the efforts of new competitors that seek to enter local markets through resale. We believe that promotions of up to 90 days, when subjected to the conditions outlined below, will have significantly lower anticompetitive potential, especially as compared to the potential procompetitive marketing uses of such promotions. We therefore establish a presumption that promotional prices offered for a period of 90 days or less need not be offered at a discount to resellers. Promotional offerings greater than 90 days in duration must be offered for resale at wholesale rates pursuant to section 251(c)(4)(A). To preclude the potential for abuse of promotional discounts, any benefit of the promotion must be realized within the time period of the promotion, *e.g.*, no benefit can be realized more than ninety days after the promotional offering is taken by the customer if the promotional offering was for ninety days. In addition, an incumbent LEC may not use promotional offerings to evade the wholesale obligation, for example

[2250] Limited time offerings of service are still subject to resale pursuant to *supra* Section VIII.A.

by consecutively offering a series of 90-day promotions.

951. We find unconvincing the arguments that the offerings under section 251(c)(4) should not apply to volume-based discounts. The 1996 Act on its face does not exclude such offerings from the wholesale obligation. If a service is sold to end users, it is a retail service, even if it is priced as a volume-based discount off the price of another retail service. The avoidable costs for a service with volume-based discounts, however, may be different than without volume contracts.

952. We are concerned that conditions that attach to promotions and discounts could be used to avoid the resale obligation to the detriment of competition. Allowing certain incumbent LEC end user restrictions to be made automatically binding on reseller end users could further exacerbate the potential anticompetitive effects. We recognize, however, that there may be reasonable restrictions on promotions and discounts. We conclude that the substance and specificity of rules concerning which discount and promotion restrictions may be applied to resellers in marketing their services to end users is a decision best left to state commissions, which are more familiar with the particular business practices of their incumbent LECs and local market conditions. These rules are to be developed, as necessary, for use in the arbitration process under section 252.

953. With respect to volume discount offerings, however, we conclude that it is presumptively unreasonable for incumbent LECs to require individual reseller end users to comply with incumbent LEC high-volume discount minimum usage requirements, so long as the reseller, in aggregate, under the relevant tariff, meets the minimal level of demand. The Commission traditionally has not permitted such restrictions on the resale of volume discount offers.[2251] We believe restrictions on resale of volume discounts will frequently produce anticompetitive results without sufficient justification. We, therefore, conclude that such restrictions should be considered presumptively unreasonable. We note, however, that in calculating the proper wholesale rate, incumbent LECs may prove that their avoided costs differ when selling in large volumes.

3. Below-Cost and Residential Service

a. Background and Comments

954. Responding to our general questions regarding the scope of limitations that may be

[2251] *See, e.g., Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, Docket No. 20097, Report and Order, 60 FCC 2d 261, 308-16 (1976) (divisions of full time private line circuits will enable smaller users to make efficient, discrete use of private line offerings, and such advantages will be in terms of cost savings and selectivity rather than technical advantages).

placed on competitors' resale of incumbent LEC services,[2252] parties addressed in their comments whether below-cost and residential services are subject to section 251(c)(4). Generally, those arguing against application of the wholesale discount also argue against requiring or even allowing resale of below-cost services. Incumbent LECs, including small incumbent LECs serving higher cost areas, and some state commissions argue that restrictions on resale of below-cost services are permissible.[2253] They argue that these services are often funded through internal subsidies that diminish with the onset of competition.[2254] GTE argues that there simply are no costs to avoid where below-cost services are offered at wholesale.[2255] GTE and PacTel argue that, if we were to apply wholesale pricing to services offered below cost, we should delay doing so until states have had the opportunity to rebalance rates.[2256]

955. Potential competitors, primarily IXCs, argue that incumbent LEC losses will not be increased as a result of resale of these services, even at a discount, so long as the services are only sold to the same class of customers to whom the incumbent LEC's offering is available.[2257] Jones Intercable further argues that not allowing resellers to "serve" customers currently subscribing to below-cost service violates the universal service provisions of the 1996 Act.[2258] The Telecommunications Resellers Association notes that establishing rules based on whether a service is offered below, at, or above cost will invite lengthy regulatory disputes.[2259] Additionally, TCC points out that incumbent LECs will continue to receive access revenue even from resold service and such revenue will continue to subsidize such services.[2260]

[2252] NPRM at para. 175.

[2253] *See, e.g.*, MECA comments at 60; SBC comments at 71-72; SNET comments at 31-32; U S West comments at 67; GTE comments at 46 (acknowledging, however, that its position on this might change depending on the outcome of universal service reform); Oregon Commission comments at 31. Additionally, incumbent LECs argue that steps should be taken to ensure that the underlying provider of the service continues to receive universal service payments. *See, e.g.*, NYNEX comments at 84.

[2254] SNET comments at 31-32. Bell Atlantic argues that this might even be considered an unconstitutional taking. Bell Atlantic reply at Attachment 2 (Epstein Declaration), p. 7.

[2255] GTE comments at 46.

[2256] PacTel reply at 44; GTE reply at 26-27.

[2257] *See, e.g.*, AT&T comments at 80; California Commission reply at 21-22; Competition Policy Institute comments at 24; GCI comments at 1, 14; LDDS comments at 84; MCI comments at 89; Sprint reply at 35-37; TCC comments at 44 n.44; Telecommunications Resellers Ass'n reply at 15.

[2258] Jones Intercable comments at 32-33.

[2259] Telecommunications Resellers Ass'n reply at 15.

[2260] TCC comments at 44 n.44.

b. Discussion

956. Subject to the cross-class restrictions discussed below, we believe that below-cost services are subject to the wholesale rate obligation under section 251(c)(4). First, the 1996 Act applies to "any telecommunications service" and thus, by its terms, does not exclude these types of services. Given the goal of the 1996 Act to encourage competition, we decline to limit the resale obligation with respect to certain services where the 1996 Act does not specifically do so. Second, simply because a service may be priced at below-cost levels does not justify denying customers of such a service the benefits of resale competition. We note that, unlike the pricing standard for unbundled elements, the resale pricing standard is not based on cost plus a reasonable profit. The resale pricing standard gives the end user the benefit of an implicit subsidy in the case of below-cost service, whether the end user is served by the incumbent or by a reseller, just as it continues to take the contribution if the service is priced above cost. So long as resale of the service is generally restricted to those customers eligible to receive such service from the incumbent LEC, as discussed below, demand is unlikely to be significantly increased by resale competition. Thus, differences in incumbent LEC revenue resulting from the resale of below-cost services should be accompanied by proportionate decreases in expenditures that are avoided because the service is being offered at wholesale.

957. We have considered the economic impact of our rules in this section on small incumbent LECs. For example, MECA argues that services incumbent LECs offer at below cost rates should not be subject to resale under section 251(c)(4). We do not adopt MECA's proposal. As explained above, we conclude that the 1996 Act provides that below-cost services are subject to the section 251(c)(4) resale obligation and that differences in incumbent LEC revenue resulting from the resale of below-cost services should be accompanied by decreases in expenditures that are avoided because the service is being offered at wholesale. Therefore, resale of below-cost services at wholesale rates should not adversely impact small incumbent LECs.[2261] We also note that certain small incumbent LECs are not subject to our rules under section 251(f)(1) of the 1996 Act, unless otherwise determined by a state commission, and certain other small incumbent LECs may seek relief from their state commissions from our rules under section 251(f)(2) of the 1996 Act.

4. Cross-Class Selling

a. Background

958. In the NPRM, we sought comment on the meaning of section 251(c)(4)(B) which provides that "[a] State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from

[2261] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

offering such service to a different category of subscribers."[2262] We suggested that competing telecommunications carriers should not be allowed to purchase a subsidized service that is offered to a specific category of subscribers and then resell such service to other customers. We tentatively concluded, for example, that it might be reasonable for a state to restrict the resale of a residential exchange service that is limited to low-income consumers, such as the existing Lifeline program.[2263] We noted that we have generally not allowed carriers to prevent other carriers from purchasing high-volume, low-price offerings to resell to a broad pool of lower volume customers.[2264] Similarly, we inquired into the propriety of practices such as limiting the resale of flat-rated service.[2265]

b. Comments

959. There is a general consensus among incumbent LECs, IXCs, and others that resale of residential service should be limited to customers eligible to take such service from the incumbent LEC under section 251(c)(4)(B).[2266] There is a similar consensus that resale of Lifeline service should be limited to those eligible to receive such service from the incumbent LEC.[2267] Some argue that section 251(c)(4)(B) is only applicable to classes of subscribers whose service is explicitly subsidized or provided at below-cost rates and that broader cross-class restrictions should be considered unreasonable.[2268] Ohio Consumers' Counsel argues that residential services that may be offered above cost are still offered at a lower profit margin than business services for public policy reasons, justifying the inclusion of all residential services in

---

[2262] NPRM at para. 176.

[2263] *Id.*

[2264] *Id.*

[2265] This practice of limiting the resale of flat-rated services was listed as an example of state practices on which ve sought comment in the NPRM at para. 177.

[2266] *See, e.g.*, ACTA comments at 25; Ameritech comments at 54; California Commission comments at 35-37; CFA/CU comments at 16; Comptel reply at 43 n.114; GTE comments at 49-50; GVNW comments at 39; Illinois Ind. Tel. Ass'n comments at 6; MCI comments at 89; NCTA comments at 57; PacTel comments at 87; Sprint comments t 70. Texas Public Utility Counsel argues that the residential cross class selling restrictions hould merely prohibit the resale of flat-rated residential service to business customers. Texas Public Utility Counsel omments at 44-45.

[2267] *See, e.g.*, California Commission comments at 36-37; LDDS comments at 84; NYNEX comments at 80.

[2268] *See, e.g.*, AT&T reply at 38-39; DOJ comments at 54; Telecommunications Resellers Association comments t 17 n.46.

the scope of section 251(c)(4)(B).[2269]

960. NYNEX and the Massachusetts Commission argue that incumbent LECs may prohibit the resale of flat-rated services.[2270] They argue that resale of services to multiple-use customers would be unfair to incumbent LECs. National Private Telecommunications Association and Jones Intercable advocate that incumbent LECs should not be allowed to impose resale restrictions that would prevent the offering of shared tenant services operations. Shared tenant services operations involve using trunking to serve multiple unit dwellings with fewer lines than would be needed if each unit separately subscribed to service directly from the incumbent LEC.[2271]

961. Finally, some parties express concern that incumbent LECs will create multitudes of classes in order to prevent resellers, as a practical matter, from competing to provide such services and recommend that any new classes be presumed unreasonable.[2272]

c. Discussion

962. There is general agreement that residential services should not be resold to nonresidential end users, and we conclude that restrictions prohibiting such cross-class reselling of residential services are reasonable. We conclude that section 251(c)(4)(B) permits states to prohibit resellers from selling residential services to customers ineligible to subscribe to such services from the incumbent LEC. For example, this would prevent resellers from reselling wholesale-priced residential service to business customers. We also conclude that section 251(c)(4)(B) allows states to make similar prohibitions on the resale of Lifeline or any other means-tested service offering to end users not eligible to subscribe to such service offerings. State commissions have established rate structures that take into account certain desired balances between residential and business rates and the goal of maximizing access by low-income consumers to telecommunications services. We do not wish to disturb these efforts by prohibiting or overly narrowing state commissions' ability to impose such restrictions on resale.

963. Shared tenant services are made possible through the resale and trunking of flat-rated services to multiple customers. We do not believe that these or other efficient uses of technology should be discouraged through restrictions on the resale of flat-rated offerings to multiple end users, even if incumbent LECs have not always priced such offerings assuming these

[2269] Ohio Consumers' Counsel comments at 36.

[2270] NYNEX comments at 80; Mass. Commission comments at 5; MECA comments at 61.

[2271] National Private Telecommunications Ass'n reply at 4-5; Jones Intercable reply at 27.

[2272] CompTel comments at 102.

usage patterns. We therefore conclude that such restrictions are presumptively unreasonable.

964. We also conclude that all other cross-class selling restrictions should be presumed unreasonable. Without clear statutory direction concerning potentially allowable cross-class restrictions, we are not inclined to allow the imposition of restrictions that could fetter the emergence of competition. As with volume discount and flat-rated offerings, we will allow incumbent LECs to rebut this presumption by proving to the state commission that the class restriction is reasonable and nondiscriminatory.

5. Incumbent LEC Withdrawal of Services

a. Background

965. In the NPRM, we sought comment on whether an incumbent LEC can avoid making a service available at wholesale rates by ceasing to offer the retail service on a retail basis, or whether the incumbent should first be required to make a showing that withdrawing the offering is in the public interest or that competitors will continue to have an alternative way of providing service. We also asked if access to unbundled elements addresses the concern that incumbent LECs could withdraw retail services.[2273]

b. Comments

966. A number of large incumbent LECs and USTA argue that incumbent LECs should be allowed to withdraw services unilaterally and unconditionally.[2274] These parties argue that they have the right to make their own business decisions and the right to terminate the offering of a service that they feel is unprofitable.[2275] Some potential competitors also supported the ability of incumbent LECs to withdraw service, but explicitly conditioned such support on bilateral "grandfathering" of existing customers, *i.e.*, allowing current end users of the terminated service to continue to purchase the service at least for a limited time.[2276] These services then would not be required to be offered for resale because they are no longer offered to the public.[2277] Thus, these parties argue that there would be a permissible restriction on the resale of "grandfathered" services permitting resale only to "grandfathered" customers. Some incumbent LECs suggest that potential concerns over incumbent LEC withdrawal of service would be eliminated if both

---

[2273] NPRM at para. 175.

[2274] *See, e.g.*, Ameritech comments at 54-55; GTE comments at 48; SBC comments at 73.

[2275] *See, e.g.*, Ameritech reply at 48; GTE comments at 48-49; MECA comments at 60-61.

[2276] *See, e.g.*, Cable & Wireless comments at 42-43.

[2277] *See, e.g.*, SBC comments at 73; J. Staurulakis comments at 5-6.

resellers and incumbent LECs could compete for grandfathered customers.[2278]

967. Several commenters, primarily IXCs, resellers, and state commissions, expressed concern about the incumbent LECs' ability to circumvent resale obligations by withdrawing services that resellers are able to use to compete effectively.[2279] IXCs, resellers, some state commissions, and others argue that unilateral withdrawals of service should be considered presumptively unreasonable.[2280] Several commenters discuss U S West's attempted withdrawal of Centrex service, a small business service that resellers frequently wish to purchase to compete with incumbent LECs, as an example of such behavior.[2281] Others ask us to require that there be a substitutable alternative to a withdrawn service before it could be withdrawn.[2282] The Telecommunications Resellers Association and Cable & Wireless argue that even the existence of a competitive alternative is not sufficient to prevent anticompetitive behavior because such a standard represents an open invitation to strategic manipulation of service offerings and pricing.[2283] Both the Ohio Commission and the Competition Policy Institute argue that access to unbundled elements does not alleviate concerns about incumbent LEC withdrawal of service offerings.[2284]

c. Discussion

968. We are concerned that the incumbent LECs' ability to withdraw services may have anticompetitive effects where resellers are purchasing such services for resale in competition with the incumbent. We decline to issue general rules on this subject because we conclude that this is a matter best left to state commissions. Many state commissions have rules regarding the

---

[2278] Ameritech reply at 49; NYNEX reply at 37.

[2279] *See, e.g.*, ACTA comments at 9; AT&T reply 37-38; CompTel comments at 101; DOJ comments at 55; Florida Commission comments at 36; MCI comments at 85; Sprint reply at 35-37; Telecommunications Resellers Ass'n comments 18-19.

[2280] *See, e.g.*, AT&T reply at 37-38; Cable & Wireless comments at 43; Ohio Commission comments at 63-64; Pennsylvania Commission comments at 36; Washington Commission comments at 32-33; ASCI comments at 59-60; Competition Policy Institute comments at 25.

[2281] *See, e.g.*, ACTA comments at 9; MCI comments at 87-88; TCC comments at 44.

[2282] Competition Policy Institute comments at 25; GST comments at 32; MFS comments at 71-72; Ohio Commission comments at 65. MCI and Frontier propose that a showing that there is no demand for a service would also be sufficient. MCI comments at 88; Frontier comments at 28. DoJ argues that unilateral withdrawal should only be allowed if the service is shown to be obsolete. DoJ comments at 55-56.

[2283] Telecommunications Resellers Ass'n comments at 19 n.49; Cable & Wireless comments at 43.

[2284] Ohio Commission comments at 64; Competition Policy Institute comments at 26.

withdrawal of retail services and have experience regulating such matters. States can assess, for example, the universal service implications of an incumbent LEC's proposal to withdraw a retail service. Therefore, we conclude that our general presumption that incumbent LEC restrictions on resale are unreasonable does not apply to incumbent LEC withdrawal of service. States must ensure that procedural mechanisms exist for processing complaints regarding incumbent LEC withdrawals of services. We find it important, however, to ensure that grandfathered customers -- subscribers to the service being withdrawn who are allowed by an incumbent LEC to continue purchasing services -- not be denied the benefits of competition. We conclude that, when an incumbent LEC grandfathers its own customers of a withdrawn service, such grandfathering should also extend to reseller end users. For the duration of any grandfathering period, all grandfathered customers should have the right to purchase such grandfathered services either directly from the incumbent LEC or indirectly through a reseller.[2285] The incumbent LEC shall offer wholesale rates for such grandfathered services to resellers for the purpose of serving grandfathered customers.

6. Provisioning

a. Comments

969. Resellers and IXCs express concern that incumbent LECs are not making, and will not make, services available for resale in a timely manner or fail to provide a minimal level of operational support and service quality.[2286] Such resellers and IXCs also argue that incumbent LEC claims of capacity shortages should not excuse failures to provide timely service or to treat resellers on an equal basis with other incumbent LEC customers.[2287] Cable & Wireless argues that customer changeover charges should not be allowed to exceed the same Primary Interexchange Carrier ("PIC") charge that is imposed when customers switch from one IXC to another.[2288] TCC proposes a set of rules regarding nondiscriminatory treatment of resellers and reporting requirements to implement such rules.[2289] These rules include provision of unbranded or rebranded operator and directory assistance services, a proposal also supported by AT&T, TCC, and ACSI.[2290] Incumbent LECs argue that refusing to build out their networks to handle reseller

---

[2285] *See Petition for a Total Local Exchange Wholesale Service Tariff from Illinois Bell Telephone Company*, Nos. 95-0458 and 95-0531 (consol.) (Illinois Commission June 26, 1996) at 38.

[2286] *See, e.g.*, Telecommunications Resellers Ass'n comments at 20-23; MCI comments at 88-89.

[2287] *See, e.g.*, Telecommunications Resellers Ass'n reply at 16 n.34; LDDS reply at 43.

[2288] Cable & Wireless comments at 49-50.

[2289] *See* TCC reply at 29-33.

[2290] *See* AT&T comments at 81 n.123; TCC reply at 31; ACSI comments at 47-48.

requests when they lack capacity is a reasonable course of action to prevent stranded investment should the reseller eventually build facilities of its own.[2291]

b. Discussion

970. We conclude that service made available for resale be at least equal in quality to that provided by the incumbent LEC to itself or to any subsidiary, affiliate, or any other party to which the carrier directly provides the service, such as end users. Practices to the contrary violate the 1996 Act's prohibition of discriminatory restrictions, limitations, or prohibitions on resale. This requirement includes differences imperceptible to end users because such differences may still provide incumbent LECs with advantages in the marketplace. Additionally, we conclude that incumbent LEC services are to be provisioned for resale with the same timeliness as they are provisioned to that incumbent LEC's subsidiaries, affiliates, or other parties to whom the carrier directly provides the service, such as end users. This equivalent timeliness requirement also applies to incumbent LEC claims of capacity limitations and incumbent LEC requirements relating to such limitations, such as potential down payments. We note that common carrier obligations, established by federal and state law and our rules, continue to apply to incumbent LECs in their relations with resellers. With regard to customer changeover charges, we conclude that states should determine reasonable and nondiscriminatory rates for such charges.

971. Brand identification is likely to play a major role in markets where resellers compete with incumbent LECs for the provision of local and toll service. This brand identification is critical to reseller attempts to compete with incumbent LECs and will minimize consumer confusion. Incumbent LECs are advantaged when reseller end users are advised that the service is being provided by the reseller's primary competitor. We therefore conclude that where operator, call completion, or directory assistance service is part of the service or service package an incumbent LEC offers for resale, failure by an incumbent LEC to comply with reseller branding requests presumptively constitutes an unreasonable restriction on resale. This presumption may be rebutted by an incumbent LEC proving to the state commission that it lacks the capability to comply with unbranding or rebranding requests. We recognize that an incumbent LEC may incur costs in complying with a request for unbranding or rebranding. Because we do not have a record on which to determine the level of fees or wholesale pricing offsets that may reasonably be assessed to recover these costs, we leave such determinations to the state commissions.

D. Resale Obligations of LECs Under Section 251(b)(1)

972. Section 251(b)(1) imposes a duty on all LECs to offer certain services for resale.

[2291] *See, e.g.*, U S West comments, Exhibit A (Federal Implementation of the Telecommunications Act of 1996) at 25-26. Incumbent LECs argue that they should be able to require minimum volume and term discounts if they must build out facilities. *See* Ameritech at 54; MECA comments at 60.

Specifically, section 251(b)(1) requires LECs "not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services."[2292]

1. Background

973. In the NPRM, we sought comment generally on the relationship of section 251(b)(1) to section 251(c)(4).[2293] We sought comment on whether all LECs are prohibited from imposing unreasonable restrictions on resale of their services, but only incumbent LECs that provide retail services to subscribers that are not telecommunications carriers are required to make such services available at wholesale rates to requesting telecommunications carriers.[2294] We also sought comment on what types of resale restrictions should be permitted under section 251(b)(1) and stated our belief that few, if any, conditions or limitations should be permitted for the same reasons that resale restrictions are sharply limited under section 251(c)(4).[2295] We also asked what standards should be adopted for determining whether resale restrictions should be permitted, and whether presumptions should be established.[2296]

2. Comments

974. A variety of commenters, including Cable & Wireless, Teleport, and several state commissions, support the view that wholesale pricing does not apply to nonincumbent LECs.[2297] A similar group of parties argue that the prohibition on unreasonable or discriminatory resale restrictions applies to nonincumbent LECs.[2298] The Ohio Consumers' Counsel contends that although nothing in section 251 requires states to create wholesale pricing for section 251(b)(1) resale, nothing in the 1996 Act prevents imposition of such pricing.[2299]

975. The Telecommunications Resellers Association argues that all resale restrictions by

---

[2292] 47 U.S.C. § 251(c)(4).

[2293] NPRM at para. 173.

[2294] *Id.* at para. 174.

[2295] *Id.*

[2296] *Id.* at para. 197.

[2297] *See, e.g.*, Cable & Wireless comments at 38 n.68; Teleport comments at 55; Pennsylvania Commission comments at 35.

[2298] Ohio Commission comments at 60-61; Pennsylvania Commission comments at 35; Teleport comments at 55; Cincinnati Bell comments at 31.

[2299] Ohio Consumers' Counsel comments at 35.

all LECs should be presumed unreasonable.[2300] MFS and Citizens Utilities contend that resale restrictions in sections 251(b)(1) and 251(c)(4)(B) should be interpreted in the same way.[2301] MFS and GST both argue that any restriction of a type that has been found reasonable for incumbent LECs should be presumed reasonable for all other LECs.[2302] NCTA asserts that new competitors have a great incentive to minimize costs, which will often involve using resellers for distribution purposes.[2303] They argue that to ensure that the resale obligations of entrants do not adversely impact their ability to engage in facilities-based competition with incumbent LECs, the Commission should defer the duty of facilities-based competitors to engage in resale.[2304]

3. Discussion

976. There are two differences between the resale obligations in section 251(b)(1) and in section 251(c)(4): the scope of services that must be resold and the pricing of such resale offerings. Section 251(b)(1) requires resale of all telecommunications services offered by the carrier while section 251(c)(4) only applies to telecommunications services that the carrier provides at retail to subscribers who are not telecommunications carriers. Thus, the scope of services to which section 251(b)(1) applies is larger and necessarily includes all services subject to resale under section 251(c)(4). We need not prescribe a minimum list of services that are subject to the 251(b)(1) resale requirement for the same reasons that we specified for not prescribing such a list in Section VIII.A. of this Order. We note that section 251(b)(1) clearly omits a wholesale pricing requirement. We therefore conclude that the 1996 Act does not impose wholesale pricing requirements on nonincumbent LECs. Nonincumbent LECs definitionally lack the market power possessed by incumbent LECs[2305] and were therefore not made subject to the wholesale pricing obligation in the 1996 Act. Their wholesale rates will face competition by incumbent LECs, making a wholesale pricing requirement for nonincumbent LECs unnecessary.

977. Sections 251(b)(1) and 251(c)(4) contain the same statutory standards regarding resale restrictions. Therefore, we conclude that our rules concerning resale restrictions under section 251(b)(1), such as the general presumption that all resale restrictions are unreasonable, should be the same as under section 251(c)(4). We conclude that any restriction of a type that has been found reasonable for incumbent LECs should be deemed reasonable for all other LECs

---

[2300] Telecommunications Resellers Ass'n comments at 53.

[2301] MFS comments at 69; Citizens Utilities comments at 27.

[2302] MFS comments at 75-76; GST comments at 33.

[2303] NCTA comments at 20-21.

[2304] *Id.* at 21.

[2305] *See* 47 U.S.C. § 251(h)(2).

as well.

E. Application of Access Charges

1. Background

978. In the NPRM, we suggested that an entrant that merely resold a bundled retail service purchased at wholesale rates would not receive access revenues.[2306] In other words, IXCs must still pay access charges to incumbent LECs for originating and terminating interstate traffic of an end user served by a telecommunications carrier that resells incumbent LEC services under section 251(c)(4).

2. Comments

979. Parties that commented on this issue generally agree with our analysis in the NPRM. Some commenters argue that incumbent LECs, including small incumbent LECs, should continue to receive access charge revenues when resellers purchase wholesale services under section 251(c)(4).[2307] The Rural Telephone Coalition argues that retail local service rates, upon which wholesale rates will be based, have been developed with the assumption that incumbent LECs will receive access charge revenues.[2308] The Wisconsin Commission points out that Wisconsin law currently prevents resale of access services performed by at least small LECs.[2309] On the other hand, the Texas Office of Public Utility Counsel asserts that switched access services are offered to end users and should be subject to resale.[2310] While they did not explicitly address the issue, some potential competitors alluded to their assumptions that such access charges would continue to be retained by the incumbent LEC.[2311]

3. Discussion

980. We conclude that the 1996 Act requires that incumbent LECs continue to receive access charge revenues when local services are resold under section 251(c)(4). IXCs must still

---

[2306] NPRM at para. 186.

[2307] Rural Tel. Coalition comments at 20; Citizens Utilities comments at 25; J. Staurulakis comments at 6.

[2308] Rural Tel. Coalition comments at 20. USTA makes a similar point, and emphasizes that incumbent LECs should continue to recover the SLC under these circumstances. USTA reply at 31.

[2309] Wisconsin Commission comments at Attachment, pp. 7-8.

[2310] Texas Public Utility Counsel reply at 17-18.

[2311] *See, e.g.*, TCC comments at 44 n.44; LDDS comments at 81; LDDS reply at 42, 46.

pay access charges to incumbent LECs for originating or terminating interstate traffic, even when their end user is served by a telecommunications carrier that resells incumbent LEC retail services. Resale, as defined in section 251(b)(1) and 251(c)(4), involves services, in contrast to section 251(c)(3), which governs sale of network elements. New entrants that purchase retail local exchange services from an incumbent LEC at wholesale rates are entitled to resell only those retail services, and not any other services -- such as exchange access -- the LEC may offer using the same facilities. IXCs must therefore still purchase access services from incumbent LECs outside of the resale framework of 251(c)(4), through existing interstate access tariffs.[2312]

981. Most existing interstate access charges are recovered from IXCs, and therefore can easily be recovered by incumbent LECs whether or not the incumbent LEC retains its billing relationship with the end user subscriber. To allow incumbent LECs to continue recovering the subscriber line charge (SLC), however, the mechanism for assessment of the SLC must be modified. The SLC is currently assessed directly on end users as a monthly charge.[2313] When an end user customer receives local exchange service from a reseller, however, the incumbent LEC will have no direct commercial relationship with that end user. Because the end user would not be a customer of the incumbent LEC, the incumbent LEC could not bill SLC directly to the end user as specified under our existing rules.

982. In March 1995, in the *Rochester Waiver Order*, we granted Rochester Telephone waivers to permit Rochester Telephone to recover the SLC from carriers that purchase local exchange service for resale, rather than recovering the SLC directly from end users.[2314] In that order, we stated that by offering the local exchange service for resale and by unbundling subscriber lines from other network functions, Rochester Telephone created a situation where it would no longer have a direct relationship with end users, IXCs, or both, and that such a situation was not contemplated when the Commission created the rules governing the recovery of access charges. We also permitted Rochester Telephone to bill to resellers the PIC change charge, which is assessed by incumbent local exchange carriers on end users that wish to change their primary interexchange carrier (PIC).

983. The resale requirements of the 1996 Act create a situation for the entire industry that is analogous to the situation Rochester Telephone faced in 1995. We therefore conclude that similar relief is warranted here with respect to the SLC, so that incumbent LECs can recover the SLC from resellers, as we conclude the 1996 Act mandates. Although the PIC change charge is

---

[2312] As discussed above, a different result occurs in the context of unbundled network elements. Purchasers of unbundled network elements in effect stand in the shoes of the LEC, and are entitled to revenues from all of the services provided using those elements.

[2313] 47 C.F.R. § 69.104.

[2314] *Rochester Telephone Corporation, Petition for Waivers to Implement its Open Market Plan, Order*, 10 FCC Rcd 6776 (1995) *(Rochester Waiver Order)*.

not a part of access charges, and is assessed only when an end user changes his or her primary interexchange carrier, this charge has similar characteristics to the SLC and therefore should also be subject to the rule we adopt. Incumbent LECs may assess the SLC and the PIC change charge on telecommunications carriers that resell incumbent LEC services under section 251(c)(4).

984. Although incumbent LECs may continue to recover the SLC when other carriers resell their local exchange services, the SLC is not subject to the wholesale pricing standard of section 252(d)(3). As described above, resellers of local exchange service are not reselling access services; they are purchasing these services from incumbent LECs in the same manner they do today. The SLC is a component of interstate access charges, not of intrastate local service rates. Consistent with the principles of cost-causation and economic efficiency, we have required the portion of interstate allocated loop costs represented by the SLC to be recovered from end users, rather than from carriers as with other access charges. Although the SLC is listed on end user monthly local service bills, this charge does not represent a "telecommunications service [an incumbent LEC] provides at retail to subscribers." Rather, the SLC, like other interstate access charges, relates solely to incumbent LEC interstate access services, which are provided to other carriers rather than retail subscribers and which we have concluded are not subject to the resale requirements of section 251(c)(4). Therefore, the reseller shall pay the SLC to the incumbent LEC for each subscriber taking resold service. The specific SLC that applies depends upon the identity of the end user served by the reselling telecommunications carrier.

IX. DUTIES IMPOSED ON "TELECOMMUNICATIONS CARRIERS" BY SECTION 251(a)

A. Background

985. Section 251(a) imposes two fundamental duties on all telecommunications carriers: (1) "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers;" and (2) "not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to sections 255 or 256."[2315] In this proceeding we determine which carriers are "telecommunications carriers" as defined in section 3(44) of the Act.[2316] In the NPRM, we tentatively concluded that, pursuant to the statute's definition of "telecommunications carrier" and "telecommunications service," to the extent a carrier is engaged in providing for a fee local, interexchange, or international services, directly to the public or to such classes of users as to be effectively available directly to the public, that carrier falls within the definition of "telecommunications carrier." We sought comment on which carriers are included under this definition, and on whether a provider may qualify as a telecommunications carrier for some purposes but not others.[2317]

986. We also tentatively concluded that we should determine whether the provision of mobile satellite services is Commercial Mobile Radio Services (CMRS) or Private Mobile Radio Service (PMRS) based on the factors set forth in the *CMRS Second Report and Order*.[2318] We

---

[2315] 47 U.S.C. § 251(a). Section 255 addresses access by persons with disabilities and ensures that manufacturers and providers of telecommunications will design equipment and provide service that is accessible to, and usable by, individuals with disabilities. Section 256 provides for coordination for interconnectivity "to promote nondiscriminatory accessibility by the broadest number of users and vendors of communications products and services." 47 U.S.C. §§ 255, 256.

[2316] The term telecommunications carrier means "any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226). A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage." 47 U.S.C. § 153(44).

[2317] NPRM at para. 246.

[2318] NPRM at para. 247. The Commission makes this determination by looking at an array of public interest considerations (*e.g.*, the types of services being offered and the number of licensees being authorized). *See, e.g.*, *Amendment of Parts 2, 22 and 25 of the Commission's Rules to Allocate Spectrum for, and To Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service for the Provision of Various Common Carrier Services*, GN Docket No. 84-1234, Second Report and Order, 2 FCC Rcd 485, 490 (1987); *Amendment to the Commission's Rules to Allocate Spectrum for, and to Establish Other Rules and Policies Pertaining to a Radiodetermination Satellite Service*, GN Docket No. 84-689, Second Report and Order, 104 FCC 2d 650, 665-66 (1986).

sought comment on the meaning of offering service "directly or indirectly" to the public in the context of section 251(a)(1) and on whether section 251(a) allows non-incumbent LECs discretion to interconnect directly or indirectly with a requesting carrier.[2319] We also sought comment on what other actions we should take to ensure that carriers do not install network features, functions, or capabilities that are inconsistent with guidelines and standards established pursuant to sections 255 and 256.

B. Comments

987. Parties generally agree with our tentative conclusion that, to the extent a carrier is engaged in providing for a fee local, interexchange, or international services, directly to the public or to such classes of users as to be effectively available to the public, that carrier falls within the definition of "telecommunications carrier."[2320] BellSouth claims that the term "telecommunications carrier" should be synonymous with "common carrier."[2321] The Texas Commission argues that the obligations of section 251(a) should apply to all telecommunications carriers -- incumbent LECs and non-incumbent LECs alike.[2322] Metricom argues, however, that because non-dominant carriers lack incentives to deny interconnection to other carriers, the Commission should forbear from imposing any interconnection requirements upon such carriers.[2323] UTC argues that a party must be offering commercial telecommunications services to be a telecommunications carrier.[2324] UTC contends that utilities and other private system operators engage in a cost-sharing for construction and operation of private telecommunications networks. UTC claims that this should not constitute a "fee" in the sense of being a payment for receiving a telecommunications service. UTC further argues that the mere provision of infrastructure, such as "dark fiber" or wholesale capacity, to third-party carriers does not constitute a direct offering to the public, and thus does not qualify carriers offering such infrastructure as telecommunications carriers under the Act. Several CMRS carriers contend that

---

[2319] NPRM at para 248.

[2320] *See, e.g.*, Louisiana Commission comments at 21; Illinois Commission comments at 81-82; Pennsylvania Commission comments at 41; BellSouth comments at 75.

[2321] BellSouth comments at 75; COMAV comments at 60; *accord* United Cerebral Palsy Ass'n at 3 and American Foundation for the Blind at 3 (favoring a broad definition of telecommunications carrier that includes any provider of access to any network available to the public).

[2322] Texas Commission comments at 34; NWRA comments at 12-13 (arguing that both facilities based carriers and resellers meet the definition of telecommunications carriers).

[2323] Metricom comments at 3.

[2324] UTC comments at 5-7.

CMRS providers are telecommunications carriers within the meaning of the Act.[2325]

988. The Illinois Commission argues that, if a company provides both telecommunications and information services, it must be classified as a telecommunications carrier for purposes of section 251.[2326] BellSouth claims, however, that a carrier may be a common carrier for some purposes, but not for others. For example, BellSouth argues that, when a common carrier also provides an information service, it is a common carrier for the provision of the telecommunications service, but a non-common carrier for the provision of the information service.[2327] ATSI contends that enhanced service providers are telecommunications carriers and entitled to the benefits of section 251.[2328]

989. The Illinois Commission argues that the Commission should continue to define mobile satellite service (MSS) as either CMRS or PMRS according to the Commission's factors set forth in the *Second CMRS Report and Order*.[2329] It argues, however, that if an MSS provider offers substitute services for those of a landline LEC, the MSS provider should also be defined as a LEC and treated accordingly under state and federal law.

990. With regard to the phrase "directly or indirectly" in section 251(a), Arch and Sprint argue that the goal is to ensure that all subscribers of one carrier are able to reach all subscribers of other carriers. They claim that this is achieved when two competitors interconnect to an incumbent LEC's network.[2330] Comcast asserts that requiring competitors to interconnect "directly or indirectly" reflects the Act's goal of applying less stringent obligations to carriers lacking market power by enabling competitors to interconnect with other carriers in a cost efficient

---

[2325] *See, e.g.*, Nextel comments at 6-7; NWRA comments at 12-13; Metricom comments at 1-7; COMAV comments at 60.

[2326] Illinois Commission comments at 81.

[2327] BellSouth comments at 75. UTC claims that only those portions of a Utility's network that is being used in the offering of telecommunications services is subject to the Act's interconnection obligations. Portions that are used on a private basis only are not. Bundling information services with telecommunications services should only create common carrier obligations to the extent that would apply if the telecommunications services were offered by themselves. UTC comments at 9-10.

[2328] ATSI reply at 6 (enhanced service providers (ESPs) must have access to network elements at terms and conditions that allow ESPs to offer competitive services in the marketplace).

[2329] Illinois Commission comments at 81.

[2330] Arch comments at 18; Sprint comments at 89. The parties add that carriers should be permitted, on a voluntary basis, to establish direct interconnection. *Id.*

manner.[2331] The Texas Commission argues that the obligations under section 251(a) should apply to all telecommunications carriers, incumbent and non-incumbents, alike. The Texas Commission claims that, if "non-[incumbent] LECs are allowed the discretion to determine whether to offer direct or indirect connection to another carrier, then the goal of encouraging the most efficient interconnection and thereby bringing the benefits of a competitive market to all consumers will not be realized."[2332]

991. The Commission received few comments on the meaning of section 251(a)(2). Commenters representing individuals with disabilities state that the term "network features, functions, and capabilities" should be defined as broadly as possible to ensure that individuals with disabilities have access to the network.[2333] The American Foundation for the Blind also suggests that any service deployed by a telecommunications carrier, or by a provider connecting to a telecommunications network, and intended for public use should be considered an installation of "features, functions, or capabilities."[2334] The United Cerebral Palsy Associations state that there are currently proceedings underway by both the Commission and by the United States Architectural & Transportation Barriers Compliance Board (Access Board) as part of the section 255 mandate. The United Cerebral Palsy Associations urge the Commission to state that the Commission has the power to enforce both the standards developed in its proceedings and those of the Access Board.[2335]

C. Discussion

992. A "telecommunications carrier" is defined as "any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226)."[2336] A telecommunications carrier shall be treated as a common carrier under the Act "only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage."[2337] A "telecommunications service" is defined as

---

[2331] Comcast comments at 16-17.

[2332] Texas Commission comments at 34.

[2333] *See, e.g.*, American Foundation for the Blind comments at 2; United Cerebral Palsy Ass'n comments at 2.

[2334] American Foundation for the Blind comments at 2.

[2335] United Cerebral Palsy Ass'n comments at 2.

[2336] 47 U.S.C. § 153(44). The term "aggregator" is defined as "any person that, in the ordinary course of its operations, makes telephones available to the public or to transient users of its premises, for interstate telephone calls using a provider of operator services." 47 U.S.C. § 226(a)(2).

[2337] 47 U.S.C. § 153 (44).

the "offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."[2338] We conclude that to the extent a carrier is engaged in providing for a fee domestic or international telecommunications, directly to the public or to such classes of users as to be effectively available directly to the public, the carrier falls within the definition of "telecommunications carrier."[2339] We find that this definition is consistent with the 1996 Act,[2340] and there is nothing in the record in this proceeding that suggests that this definition should not be adopted. Also, enhanced service providers, to the extent that they are providing telecommunications services, are entitled to the rights under section 251(a).

993. We believe, as a general policy matter, that all telecommunications carriers that compete with each other should be treated alike regardless of the technology used unless there is a compelling reason to do otherwise. We agree with those parties that argue that all CMRS providers are telecommunications carriers and are thus obligated to comply with section 251(a).[2341] These carriers meet the definition of "telecommunications carrier" because they are providers of telecommunications services as defined in the 1996 Act and are thus entitled to the benefits of section 251(c), which include the right to request interconnection and obtain access to unbundled elements at any technically feasible point in an incumbent LEC's network. PMRS is defined as any mobile service that is not a commercial service or the functional equivalent of a commercial mobile service.[2342] We conclude that to the extent a PMRS provider uses capacity to provide domestic or international telecommunications for a fee directly to the public, it will fall within the definition of "telecommunications carrier" under the Act and will be subject to the duties listed in section 251(a).[2343]

[2338] 47 U.S.C. § 153(44). "Telecommunications" is defined in the Act as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43).

[2339] NPRM at para. 246.

[2340] 47 U.S.C. § 153(44), 153(46).

[2341] The term "CMRS" is defined as "any mobile service . . . that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public." 47 U.S.C. § 332(d)(1). CMRS includes, among others, some private paging, personal communications services, business radio services, and mobile service that is the functional equivalent of a commercial mobile radio service. 47 C.F.R. § 20.9.

[2342] 47 U.S.C. § 332(d)(3).

[2343] The Commission held in the *CMRS Second Report and Order* that any PMRS provider that "employs spectrum for not-for-profit services, such as an internal operation, but also uses its excess capacity to make available a service that is intended to receive compensation, will be deemed to be a 'for profit' service to the extent of such excess capacity activities." *Implementation of Section 3(n) and 332 of the Communications Act*, Second Report and

994. We conclude that cost-sharing for the construction and operation of private telecommunications networks is not within the definition of "telecommunications services" and thus such operators of private networks are not subject to the requirements of section 251(a). We believe that such methods of cost-sharing do not equate to a "fee directly to the public" under the definition of "telecommunications service."[2344] Conversely, to the extent an operator of a private telecommunications network is offering "telecommunications"[2345] for a fee directly to the public, or to such classes of users as to be effectively available directly to the public (*i.e.*, providing a telecommunications service),[2346] the operator is a telecommunications carrier and is subject to the duties in section 251(a). Providing to the public telecommunications (*e.g.*, selling excess capacity on private fiber or wireless networks), constitutes a telecommunications service and thus subjects the operator of such a network to the duties of section 251(a) to that extent.

995. We conclude that, if a company provides both telecommunications and information services, it must be classified as a telecommunications carrier for purposes of section 251, and is subject to the obligations under section 251(a), to the extent that it is acting as a telecommunications carrier. We also conclude that telecommunications carriers that have interconnected or gained access under sections 251(a)(1), 251(c)(2), or 251(c)(3), may offer information services through the same arrangement, so long as they are offering telecommunications services through the same arrangement as well. Under a contrary conclusion, a competitor would be precluded from offering information services in competition with the incumbent LEC under the same arrangement, thus increasing the transaction cost for the competitor. We find this to be contrary to the pro-competitive spirit of the 1996 Act. By rejecting this outcome we provide competitors the opportunity to compete effectively with the incumbent by offering a full range of services to end users without having to provide some services inefficiently through distinct facilities or agreements. In addition, we conclude that enhanced service providers that do not also provide domestic or international telecommunications, and are thus not telecommunications carriers within the meaning of the Act, may not interconnect under section 251.

996. Consistent with our tentative conclusion in the NPRM, we will determine whether the provision of mobile satellite service (MSS) is CMRS (and therefore common carriage) or

---

Order, GN Docket No. 93-252, 9 FCC Rcd 1411, 1429 (1994) *(CMRS Second Report and Order)*.

[2344] 47 U.S.C. § 153(46).

[2345] The term "telecommunications" means "the transmission, between or among points specified by the user, of information of the user's choosing, without change in form or content of the information as sent and received." 47 U.S.C. § 153(43).

[2346] 47 U.S.C. § 153(46).

PMRS based on the factors set forth in the *CMRS Second Report and Order*.[2347] Commenters have not raised objections to the Commission's tentative conclusion on this issue.

997. Regarding the issue of interconnecting "directly or indirectly" with the facilities of other telecommunications carriers, we conclude that telecommunications carriers should be permitted to provide interconnection pursuant to section 251(a) either directly or indirectly, based upon their most efficient technical and economic choices. The interconnection obligations under section 251(a) differ from the obligations under section 251(c). Unlike section 251(c), which applies to incumbent LECs, section 251(a) interconnection applies to all telecommunications carriers including those with no market power. Given the lack of market power by telecommunication carriers required to provide interconnection via section 251(a), and the clear language of the statute, we find that indirect connection (*e.g.*, two non-incumbent LECs interconnecting with an incumbent LEC's network) satisfies a telecommunications carrier's duty to interconnect pursuant to section 251(a). We decline to adopt, at this time, Metricom's suggestion to forbear under section 10 of the 1996 Act[2348] from imposing any interconnection requirements upon non-dominant carriers. We believe that, even for telecommunications carriers with no market power, the duty to interconnect directly or indirectly is central to the 1996 Act and achieves important policy objectives. Nothing in the record convinces us that we should forbear from imposing the provisions of section 251(a) on non-dominant carriers. In fact, section 251 distinguishes between dominant and non-dominant carriers, and imposes a number of additional obligations exclusively on incumbent LECs.[2349] Similarly, we also do not agree with the Texas Commission's argument that the obligations of section 251(a) should apply equally to all telecommunications carriers. Section 251 is clear in imposing different obligations on carriers depending upon their classification (*i.e.*, incumbent LEC, LEC, or telecommunications carrier).[2350] For example, section 251(c) specifically imposes obligations upon incumbent LECs to interconnect, upon request, at all technically feasible points. This direct interconnection, however, is not required under section 251(a) of all telecommunications carriers.

998. Section 251(a)(2) prohibits telecommunications carriers from installing network features, functions, and capabilities that do not comply with standards or guidelines established under sections 255 and 256. Because the Commission and the Architectural and Transportation Barriers Compliance Board have not developed standards or guidelines under section 255, we find that it would be premature at this point to attempt to delineate specific requirements or definitions

---

[2347] *CMRS Second Report and Order*, 9 FCC Rcd at 1457-58 (1994).

[2348] 47 U.S.C. § 160.

[2349] *See* 47 U.S.C. § 251. The 1996 Act makes further provisions for rural carriers and, upon an appropriate showing, carriers serving fewer than 2 percent of the nation's access lines. *See* 47 U.S.C. § 251(f)(1), (f)(2).

[2350] 47 U.S.C. § 251.

of terms to implement Section 251(a)(2).[2351] Similarly, the Commission has asked its federal advisory committee, the Network Reliability and Interoperability Council, for recommendations on how the Commission should implement Section 256. We intend to issue a further notice of proposed rulemaking seeking comment on what accessibility and compatibility requirements apply to telecommunications carriers who install network features, functions and capabilities.

[2351] The Illinois Commission lists several features which could provide access to individuals with disabilities, such as access to interrupt messages, directory assistance and operator services by users of text telephones (TTYs). Illinois Commission comments at 82-83. Specific accessibility requirements such as those proposed by the Illinois Commission will need to be developed in proceedings to implement section 255, and therefore, we will not set forth any required "features, functions, or capabilities" in this proceeding.

X. COMMERCIAL MOBILE RADIO SERVICE INTERCONNECTION

999. In the NPRM, we sought comment on whether interconnection arrangements between incumbent LECs and CMRS providers fall within the scope of sections 251 and 252. Application of sections 251 and 252 to LEC-CMRS interconnection arrangements involves two distinct issues. One is whether the terms and conditions of the physical interconnection between incumbent LECs and CMRS providers are governed under section 251(c)(2), and the corresponding pricing standards set forth in section 252(d)(1). The second, and perhaps more critical issue from the CMRS providers' perspective, is whether CMRS providers are entitled to reciprocal compensation for transport and termination under section 251(b)(5), and the corresponding pricing standards set forth in section 252(d)(2).[2352]

1000. We tentatively concluded in the NPRM that CMRS providers are not obliged to provide to requesting telecommunications carriers either reciprocal compensation for transport and termination of telecommunications under section 251(b)(5), or interconnection under the provisions of section 251(c)(2), but that CMRS providers may be entitled to request interconnection under section 251(c)(2) for the purposes of providing "telephone exchange service and exchange access."[2353] We sought comment on this tentative conclusion. We also asked for comment on the separate but related question of whether LEC-CMRS transport and termination arrangements fall within the scope of section 251(b)(5). In addition, we sought comment on the relationship between section 251 and section 332(c).[2354] We acknowledged that issues relating to LEC-CMRS interconnection pursuant to section 332(c) were part of an ongoing proceeding initiated before the passage of the 1996 Act[2355] and retained the prerogative of incorporating by reference the comments filed in that docket to the extent necessary. We hereby do so.

[2352] 47 U.S.C. §§ 251, 252.

[2353] 47 U.S.C. §§ 251(b)(5), 251(c)(2).

[2354] 47 U.S.C. §332(c). This section sets forth the regulatory treatment for mobile services, including the common carrier treatment of CMRS providers (except for such provisions of Title II as the Commission may specify), the right of CMRS providers to request (and the Commission to order) physical interconnection with other common carriers and the preemption of state regulation of the entry of or the rates charged by any CMRS providers.

[2355] *Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, Notice of Proposed Rulemaking, CC Docket No. 95-185, 11 FCC Rcd 5020 (1996) (*LEC-CMRS Interconnection NPRM*).

A. CMRS Providers and Obligations of Local Exchange Carriers Under Section 251(b) and Incumbent Local Exchange Carriers Under Section 251(c).

1. Background

1001. Section 251(b) imposes duties only on LECs, and section 251(c) imposes duties only on incumbent LECs. Section 3(26) of the Act defines "local exchange carrier" to mean "any person that is engaged in the provision of telephone exchange service or exchange access," but "does not include a person insofar as such person is engaged in the provision of a commercial mobile service under section 332(c), except to the extent that the Commission finds that such service should be included in the definition of such term."[2356] In the NPRM, we sought comment on whether, and to what extent, CMRS providers should be classified as "local exchange carriers" and therefore subject to the duties and obligations imposed by section 251(b).

2. Comments

1002. Most of the comments on this issue urge that CMRS providers should not be classified as LECs.[2357] Some commenters assert that CMRS was expressly excluded from the definition of a LEC in section 3(a)(2)(44) of the 1996 Act and that the legislative history confirms that Congress intended that the Commission reconsider whether CMRS providers should be classified as LECs only if "future circumstances warrant."[2358] PCIA maintains that there is no basis for classifying CMRS providers as LECs, because CMRS is not yet a substitute for wireline local exchange service for a substantial number of subscribers, and because CMRS licensees lack the control over essential facilities that underlies the adoption of Section 251.[2359] Pronet contends that paging operators do not provide local exchange services, and that Congress did not contemplate treating CMRS providers as LECs.[2360] Some CMRS providers propose that the Commission apply the criteria in section 332(c)(3) in considering whether a CMRS provider should be classified as a LEC -- that the service is a replacement for a substantial portion of the

---

[2356] 47 U.S.C. § 153(26).

[2357] 360 Communications comments at 9; Airtouch comments at 9; Bell Atlantic/NYNEX Mobile comments at 5; F. Williamson comments at 8-9; Cox comments at 50-51; PCIA comments at 16.

[2358] *See, e.g.*, Airtouch reply at 4-6 (*citing* H.R. Rep. No. 104-458, 104th Cong., 2d Sess. 115 (1996)); PCIA reply at 6; Bell Atlantic/NYNEX Mobile comments at 4-5; PCIA comments at 16; GTE reply at 40 (Commission already found that CMRS providers should not be regulated as LECs for the purpose of interconnection and the 1996 Act does nothing to alter this conclusion).

[2359] PCIA comments at 17; *accord* Nextel comments at 6.

[2360] Pronet comments at 8.

wireline telephone exchange service within a state.[2361] Nextel argues that a CMRS provider should not be classified as a LEC until it has become a substitute for a land-line telephone exchange service for a substantial portion of the communications within a state.[2362] Omnipoint states that application of the section 332(c)(3) test will permit CMRS providers, which are also small businesses, to be relieved of LEC-type regulatory burdens during their initial entry years, so that they can act as "spirited, if smaller" competitors to the incumbent LEC.[2363] The Ohio Commission contends that the Commission should consider market share, diversity of network, and name recognition in classifying CMRS providers as LECs.[2364]

1003. COMAV and National Wireless Resellers Association, on the other hand, contend that CMRS entities can provide exchange and exchange access services "and thus are *de facto*" LECs.[2365] COMAV also argues that, if a CMRS provider is a subsidiary of an incumbent LEC, it should be treated as an incumbent LEC, and thus be required to unbundle and allow direct interconnection.[2366] NARUC argues that the type of service provided, rather than the technology employed, should determine the appropriate regulatory treatment, and that a CMRS provider should therefore be treated as a LEC if it provides fixed local service.[2367] The Illinois Commission similarly indicates that a CMRS provider should be regulated as a LEC when it establishes a wireless local loop for the express purpose of competing against or bypassing the landline loop.[2368]

3. Discussion

1004. We are not persuaded by those arguing that CMRS providers should be treated as LECs, and decline at this time to treat CMRS providers as LECs. Section 3(26) of the Act, quoted above, makes clear that CMRS providers should not be classified as LECs until the Commission makes a finding that such treatment is warranted. We disagree with COMAV and National Wireless Resellers Association that CMRS providers are *de facto* LECs (and even

---

[2361] Cox comments at 51 n.96; Omnipoint comments at 2; Vanguard comments at 21; BellSouth comments at 70; 360 Communications comments at 9; Bell Atlantic/NYNEX Mobile comments at 5.

[2362] Nextel reply at 2.

[2363] Omnipoint comments at 3-4.

[2364] Ohio Commission comments at 68.

[2365] COMAV comments at 2; National Wireless Resellers Assn comments at 7-10.

[2366] COMAV comments at 2, 40-43.

[2367] NARUC comments at 21.

[2368] Illinois Commission comments at 63-64.

incumbent LECs if they are affiliated with a LEC) simply because they provide telephone exchange and exchange access services. Congress recognized that some CMRS providers offer telephone exchange and exchange access services, and concluded that their provision of such services, by itself, did not require CMRS providers to be classified as LECs. We further note that, because the determination as to whether CMRS providers should be defined as LECs is within the Commission's sole discretion, states are preempted from requiring CMRS providers to classify themselves as "local exchange carriers" or be subject to rate and entry regulation as a precondition to participation in interconnection negotiations and arbitrations under sections 251 and 252.

1005. NARUC argues that CMRS providers should be classified as LECs if they provide fixed service.[2369] We are currently seeking comment in our *CMRS Flexibility Proceeding*[2370] on the regulatory treatment to be afforded CMRS providers when they provide fixed services. Thus, we believe that it would be premature to answer that question here, based only on the record in this proceeding. We also decline to adopt the Illinois Commission's suggestion that we find that a CMRS provider is a LEC if the CMRS provider seeks to compete directly with a wireline LEC. Even if we were to accept the Illinois Commission's underlying assumption, the record in this proceeding contains no evidence that wireless local loops have begun to replace wireline loops for the provision of local exchange service. Thus, until such time that we decide otherwise, CMRS providers will not be classified as LECs, and are not subject to the obligations of section 251(b). We further note that, even if we were to classify some CMRS providers as LECs, other types of CMRS providers, such as paging providers, might not be so classified because they do not offer local exchange service or exchange access.

1006. We further note that, because CMRS providers do not fall within the definition of a LEC under section 251(h)(1), they are not subject to the duties and obligations imposed on incumbent LECs under section 251(c).[2371] An incumbent LEC is defined in section 251(h)(1), and includes only those LECs that were, on the date of enactment of the 1996 Act, deemed to be members of NECA pursuant to 47 C.F.R. § 69.601(b), or the successor or assign of a NECA member. Similarly, we do not find that CMRS providers satisfy the criteria set forth in section 251(h)(2), which grants the Commission the discretion to, by rule, provide for the treatment of a LEC as an incumbent LEC if certain conditions are met.[2372]

[2369] NARUC comments at 21.

[2370] *Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services*, WT Docket No. 96-6, First Report and Order and Further Notice of Proposed Rulemaking, FCC 96-283 (released August 1, 1996).

[2371] 47 U.S.C. § 251(h)(1). *See infra*, Section XI.C.

[2372] 47 U.S.C. § 251(h)(2). *See infra*, Section XI.C.

B. Reciprocal Compensation Arrangements Under Section 251(b)(5)

1007. Some parties contend that LEC-CMRS transport and termination arrangements do not fall within the scope of 251(b)(5), which requires LECs to establish reciprocal compensation arrangements for transport and termination.[2373] Other commenters argue that because CMRS providers fall within the definition of "telecommunications carriers," they fall within the scope of section 251(b)(5).[2374]

1008. Under section 251(b)(5), LECs have a duty to establish reciprocal compensation arrangements for the transport and termination of "telecommunications."[2375] Under section 3(43), "[t]he term 'telecommunications' means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[2376] All CMRS providers offer telecommunications. Accordingly, LECs are obligated, pursuant to section 251(b)(5) (and the corresponding pricing standards of section 252(d)(2)), to enter into reciprocal compensation arrangements with all CMRS providers, including paging providers, for the transport and termination of traffic on each other's networks, pursuant to the rules governing reciprocal compensation set forth in Section XI.B., below.

C. Interconnection Under Section 251(c)(2)

1. Background

1009. Section 251(c)(2)(A) provides that an incumbent LEC must provide interconnection with its local exchange network to "any requesting telecommunications carrier . . . for the transmission and routing of telephone exchange service and exchange access."[2377] In the NPRM, we tentatively concluded that CMRS providers may be entitled to request interconnection under section 251(c)(2) for the purposes of providing telephone exchange service and exchange access.[2378] We sought comment on this tentative conclusion.

2. Comments

[2373] PCIA comments at 13; PageNet comments at 10; APC comments at 1.

[2374] BellSouth comments at 63; National Wireless Resellers Assn comments at 7; Mobilemedia comments at 13.

[2375] 47 U.S.C. § 251(b)(5).

[2376] 47 U.S.C. § 153(43).

[2377] 47 U.S.C. § 251(c)(2)(A).

[2378] 47 U.S.C. § 251(c)(2).

1010. Several commenters argue that many CMRS providers provide telephone exchange service and exchange access as defined by the 1996 Act, and thus section 251(c)(2) should govern their interconnection arrangements with incumbent LECs.[2379] NYNEX contends that all CMRS providers, other than providers of one-way paging, provide telephone exchange service.[2380] The Ohio Commission contends that all voice grade CMRS providers which provide local exchange service may request interconnection under section 251(c)(2).[2381] The Pennsylvania Commission argues that all voice-grade and non-voice grade CMRS providers fit within the definition of telecommunications carriers and fall within the parameters of section 251(c)(2).[2382]

1011. Many wireless carriers argue that interconnection arrangements between incumbent LECs and CMRS providers do not fall within the scope of section 251(c)(2).[2383] CTIA claims that CMRS was intended to be regulated differently than other services because it entails different traffic flows and different termination costs.[2384] Airtouch claims that, if LEC-CMRS interconnection were found to fall within the scope of section 251, the concept of "local exchange areas" could create implementation problems and adverse policy results, thus supporting application of section 332(c)(1)(B).[2385]

3. Discussion

1012. As discussed in the preceding section, CMRS providers meet the statutory definition of "telecommunications carriers."[2386] We also agree with several commenters that many CMRS providers (specifically cellular, broadband PCS and covered SMR) also provide telephone

---

[2379] *See, e.g.*, Pennsylvania Commission comments at 34; PacTel comments at 83; Bell Atlantic/NYNEX Mobile comments at 7; Nextel comments at 6-7; API comments at 3; Florida Commission comments at 35-36.

[2380] NYNEX comments at 23.

[2381] Ohio Commission comments at 59.

[2382] Pennsylvania Commission comments at 34.

[2383] *See, e.g.*, AT&T comments at 43; Sprint comments at 70; Bell Atlantic/NYNEX Mobile comments at 2; CTIA comments at 2-3; Nextel comments at 5-6; Omnipoint comments at 3-5; Vanguard comments at 20-22; MECA comments at 59; Arch comments at 12-13; Airtouch reply at 3; Sprint/APC comments at 2-3 (Congress crafted a definition of "local exchange carrier" that excluded CMRS indicating that it did not want CMRS providers treated with all providers of telecommunications services). Sprint/APC claim in their joint comments that it is clear from the 1996 Act as a whole, and from section 332(c), that CMRS providers are entitled to reasonable interconnection from LECs without regard to section 251. Sprint/APC comments at 5.

[2384] CTIA comments at 7; Sprint/APC comments at 3.

[2385] Airtouch reply at 7.

[2386] *See supra*, Section IX.

exchange service and exchange access as defined by the 1996 Act. Incumbent LECs must accordingly make interconnection available to these CMRS providers in conformity with the terms of sections 251(c) and 252, including offering rates, terms, and conditions that are just, reasonable and nondiscriminatory.[2387]

1013. The 1996 Act defines "telephone exchange service" as "service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area . . . and which is covered by the exchange service charge, *or (B) comparable service* provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service."[2388] At a minimum, we find that cellular, broadband PCS, and covered SMR providers fall within the second part of the definition because they provide "comparable service" to telephone exchange service. The services offered by cellular, broadband PCS, and covered SMR providers are comparable because, as a general matter, and as some commenters note, these CMRS carriers provide local, two-way switched voice service as a principal part of their business.[2389] Indeed, the Commission has described cellular service as exchange telephone service[2390] and cellular carriers as "generally engaged in the provision of local exchange telecommunications in conjunction with local telephone companies . . . ."[2391] In addition, although CMRS providers are not currently classified as LECs, the fact that most CMRS providers are capable, both technically and pursuant to the terms of their licenses, of providing fixed services, as LECs do, buttresses our conclusion that these CMRS providers offer services that are "comparable" to telephone exchange service and supports the notion that these services may become a true economic substitute for wireline local

[2387] 47 U.S.C. § 251(c)(2)(D).

[2388] 47 U.S.C. § 153(47) (emphasis added). This is a broader definition of "telephone exchange service" than had previously existed; Congress changed the definition in the 1996 Act to include services "comparable" to telephone exchange.

[2389] *See, e.g.*, NYNEX comments at 23.

[2390] *See Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carriers*, Memorandum Opinion and Order, 59 Rad. Reg.2d 1275, 1278 (1986).

[2391] *In the Matter of the Need to Promote Competition and Efficient Use of Spectrum For Radio Common Carrier Services*, Memorandum Opinion and Order, 59 Rad. Reg. 2d 1275, 1278 (1986) (*Competition Opinion*); *see also id.* at 1284 (cellular carriers are primarily engaged in the provision of local, intrastate exchange telephone service); *Equal Access and Interconnection Obligations Pertaining to Commercial Radio Services*, CC Docket No. 94-54, Notice of Proposed Rulemaking and Notice of Inquiry, 9 FCC Rcd 5408, 5453 and nn.192, 195 (and cases cited therein) (1994).

exchange service in the future.[2392]

1014. We also believe that other definitions in the Act support the conclusion that cellular, broadband PCS, and covered SMR licensees provide telephone exchange service. The fact that the 1996 Act's definition of a LEC excludes CMRS until the Commission finds that such service should be included in the definition,"[2393] suggests that Congress found that some CMRS providers were providing telephone exchange service or exchange access, but sought to afford the Commission the discretion to decide whether CMRS providers should be treated as LECs under the new Act. Similarly, section 253(f) permits the states to impose certain obligations on "telecommunications carrier[s] that seek[ ] to provide telephone exchange service" in rural areas.[2394] The provision further provides that "[t]his subsection sh[illegible] not apply . . . to a provider of commercial mobile services."[2395] It would have been unnecessary for the statute to include this exception if some CMRS were not telephone exchange service. Similarly, section 271(c)(1)(A), which sets forth conditions for determining the presence of a facilities-based competitor for purposes of BOC applications to provide in-region, interLATA services, provides that Part 22 [cellular] services "shall not be considered to be telephone exchange services," for purposes of that section.[2396] Again, if Congress did not believe that cellular providers were engaged in the provision of telephone exchange service, it would not have been necessary to exclude cellular providers from this provision.

1015. The arguments that CMRS traffic flows may differ from wireline traffic, that CMRS providers' termination costs may differ from LECs, that CMRS service areas do not coincide with wireline local exchange areas, or that CMRS providers are not LECs, do not alter our conclusion that cellular, broadband PCS, and covered SMR licensees provide telephone exchange service. These considerations are not relevant to the statutory definition of telephone exchange service in section 3(47). Incumbent LECs are required to provide interconnection to CMRS providers who request it for the transmission and routing of telephone exchange service or exchange access, under the plain language of section 251(c)(2).[2397]

[2392] *See Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services*, WT Docket No. 96-6, First Report and Order and Further Notice of Proposed Rulemaking, FCC 96-283 (released August 1, 1996)(amending rules to allow providers of narrowband and broadband PCS, cellular, CMRS SMR, CMRS paging, CMRS 220 MHz service, and for-profit interconnected business radio services to offer fixed wireless services on their assigned spectrum on a co-primary basis with mobile services).

[2393] 47 U.S.C. § 153(26).

[2394] 47 U.S.C. § 253(f).

[2395] *Id.*

[2396] 47 U.S.C. § 271(c)(1)(A).

[2397] 47 U.S.C. § 251(c)(2).

D. Jurisdictional Authority for Regulation of LEC-CMRS Interconnection Rates

1. Background

1016. In the NPRM, we sought comment on the relationship between section 251 and section 332(c).[2398] As noted above, we hereby incorporate by reference the comments filed in CC Docket No. 95-185 to the extent relevant to our analysis. In the NPRM, we noted that we had previously sought comment on the relationship of these two statutory provisions in the LEC-CMRS Interconnection proceeding.[2399] In the LEC-CMRS proceeding, we tentatively concluded that the Commission has sufficient authority to promulgate specific federal requirements for interstate and intrastate LEC-CMRS interconnection arrangements, including the adoption of a specific interim bill and keep arrangement.[2400] However, we reached that tentative conclusion before the enactment of the 1996 Act.

2. Comments

1017. Several wireless firms argue that LEC-CMRS interconnection rates are governed by section 332 rather than (or in addition to) sections 251 and 252.[2401] One argument advanced by some parties is that section 251(i), which provides that "[n]othing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201,"[2402] preserves the Commission's authority over interstate interconnection under section 201.[2403] Thus, they argue, section 251(i) enables the Commission to not apply sections 251 and 252 whenever interstate services are at issue.[2404] Cox states that, because "Section 251 does not prevent the Commission from establishing an interconnection policy for LEC-to-CMRS traffic under its general Section 201 powers, Section 252 has no particular relevance for any interconnection

---

[2398] 47 U.S.C. § 332.

[2399] NPRM at para. 169.

[2400] *Id.* at 5072-73.

[2401] *See, e.g.*, AT&T comments at 42; Airtouch comments at 5; Cox comments at 50; CTIA reply at 2; PCIA comments at 3-9.

[2402] 47 U.S.C. § 251(i).

[2403] *See, e.g.*, Cox comments in CC Docket No. 95-185 at 43-44; CTIA comments in CC Docket No. 95-185 at 62; Omnipoint comments at 12; Vanguard Cellular comments at 15.

[2404] Cox comments in CC Docket No. 95-185 at 43-44.

policy established by this proceeding."[2405]

1018. Another theory proposed by several wireless carriers is that section 332 makes all CMRS interconnection issues interstate, including interconnection rates, and thus all CMRS interconnection matters are subject to federal jurisdiction under section 201, and are not governed by sections 251 and 252.[2406] These parties assert that, prior to the 1993 Budget Act, the Commission did not exercise any authority over the intrastate rates of LEC interconnection provided to radio common carriers, but that the 1993 Budget Act changed the Commission's jurisdiction over LEC-CMRS interconnection rates.[2407] Parties rely on two provisions amended or added by the 1993 Budget Act to reach this conclusion. First, they point to section 332(c)(3), entitled "State Preemption," which provides in pertinent part that "*[n]otwithstanding section[ ] 2(b) . . .*, no State or local government shall have any authority to regulate the entry of or *the rates charged by any commercial mobile service* or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services."[2408] Second, commenters point to a limiting clause added to section 2(b), which provides that: "*[e]xcept as provided in section 223 through 227, inclusive, and section 332 . . .*, nothing in this Act shall be construed to apply or to give the Commission jurisdiction [over intrastate telecommunications]."[2409] Cox interprets these cross-references to mean that, "[u]nder this revised framework, the States retain jurisdiction to regulate the 'terms and conditions' of CMRS service delivered to end users and can petition the Commission to regulate CMRS rates when CMRS becomes a substitute for landline telephone service," but that "[i]n the meantime, CMRS is a wholly interstate service and any interconnection to a CMRS provider, regardless of the source, is an interconnection governed by the FCC's interstate jurisdiction under Section 201 of the Communications Act."[2410]

1019. Some parties further argue that section 332(c)(1)(B) gives the Commission exclusive jurisdiction over LEC-to-CMRS interconnection rates.[2411] Cox argues that section

---

[2405] *Id.* at 44.

[2406] *Id.* at 39 n.77. *See also, e.g.*, Comcast comments in CC Docket No. 95-185 at 27; PageNet comments in CC Docket No. 95-185 at 37-38.

[2407] *Id.*

[2408] 47 U.S.C. § 332(c)(3)(A) (emphasis added).

[2409] 47 U.S.C. § 152(b) (emphasis added).

[2410] Cox comments in CC Docket No. 95-185 at 38-39.

[2411] *See, e.g.*, CTIA comments in Docket 95-185 at 62; Cox comments in CC Docket No. 95-185 at 44 n.78; Comcast comments in CC Docket No. 95-185 at 32.

332(c)(1)(B) expands the Commission's jurisdiction over CMRS by authorizing the Commission to order any common carrier, regardless of whether it is an intrastate or interstate carrier, to establish physical connections with any CMRS provider. Section 332(c)(1)(B) thus shows, according to Cox, "Congress' intent that the Commission be given full jurisdiction to regulate *all* aspects of CMRS, including interconnection to and from CMRS providers."[2412] Airtouch states that the Commission's section 201 jurisdiction is unaffected by Section 332(c)(1)(B) "except to the extent that the Commission is required to respond to [any CMRS provider's interconnection] request," and thus, section 332(c)(1)(B) does expand the Commission's section 201 authority, but only to the extent that LEC-CMRS interconnection - interstate and/or intrastate - is involved.[2413] CTIA contends that section 332(c)(3) must be read in a way that does not result in a one-sided regulatory scheme for LEC-to-CMRS interconnection and CMRS-to-LEC interconnection.[2414] Thus, according to CTIA, since section 332(c)(3) clearly preempts state regulation of interconnection rates charged *by* CMRS providers, it also preempts state regulation of interconnection rates charged *to* CMRS providers by LECs.[2415]

1020. Some parties contend that, because CMRS providers need interconnection to enter the market, all state regulation of interconnection affecting CMRS (including the intrastate rates charged by LECs) is entry regulation and therefore preempted under section 332(c)(3).[2416] Other commenters argue that section 253(e), which provides that "[n]othing in this section shall affect the application of section 332(c)(3) to commercial mobile service providers," demonstrates the Commission's exclusive jurisdiction over CMRS interconnection rates.[2417] CTIA argues that, "to apply Sections 251 and 252 to the LEC-CMRS relationship in place of Section 332, the Commission would effectively strip Section 332 of any meaning."[2418] Several parties also cite to the legislative history of both the 1993 Budget Act and the 1996 Act as support for their claims

---

[2412] Cox comments in CC Docket No. 95-185 at 39 n.78 (emphasis in original).

[2413] Airtouch comments at 6; *Ex Parte* letter from Kathleen Q. Abernathy, Airtouch, to William F. Caton, Acting Secretary, FCC, July 18, 1996, at 1-2.

[2414] CTIA comments in CC Docket No. 95-185 at 73.

[2415] *Id.*

[2416] Omnipoint comments in CC Docket No. 95-185 at 13 (disparate state regulation of interconnection would serve as a prohibited state barrier to entry under section 332(c)(3)); Celpage comments in CC Docket No. 95-185 at 11-12 (inconsistent state regulation of LEC-CMRS interconnection rates would create barriers to entry).

[2417] *See, e.g.*, PageNet comments at 29; *Ex Parte* letter in CC Docket No. 95-185 from Werner K. Hartenberger and Laura H. Phillips, Counsel for Cox Enterprises, Inc., to William F. Caton, Acting Secretary, FCC, February 28, 1996, at 8 (Cox Feb. 28 *Ex Parte*); *see also* Nextel reply at 5.

[2418] CTIA comments at 59-60.

that section 332 governs LEC-CMRS interconnection arrangements.[2419] Some commenters note that the 1996 Act did not explicitly repeal section 332, and state that implicit repeals are disfavored under principles of statutory construction.[2420] In addition, Cox argues that the exception in section 271(c) for cellular providers suggests that Congress considers cellular service to be in an entirely different competitive market from landline local exchange service, thus preserving the Commission's exclusive jurisdiction over LEC-CMRS interconnection granted by the 1993 Budget Act.[2421]

1021. Incumbent LECs and other parties, on the other hand, argue that section 251 controls interconnection between CMRS providers and incumbent LECs.[2422] Several of these parties contend that section 332 only governs the rates CMRS providers charge their end users, not the rates that LECs or CMRS providers charge other telecommunications carriers for interconnection.[2423] NYNEX claims that, while section 332(c)(1)(B) addresses the establishment of physical interconnection, it does not address particular compensation arrangements for interconnection between carriers, which Congress has now addressed in sections 251 and 252.[2424] Parties further note that the language in section 332(c)(1), stating that "this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection" expressly limits the Commission's authority to respond to a CMRS provider's request for interconnection and thus does not give the Commission jurisdiction over LEC-CMRS interconnection rates.[2425] BellSouth further argues that subjecting CMRS providers' charges for termination of LEC-originated calls to federal preemption would be inconsistent with Congress's

---

[2419] *See e.g.*, Cox comments at 43-44; *Ex Parte* letter in CC Docket No. 95-185 from Robert F. Roche, CTIA, to William F. Caton, Acting Secretary, FCC, February 28, 1996, at 1.

[2420] *See, e.g.*, Cox reply in CC Docket No. 95-185 at 69-70.

[2421] Cox Feb. 28 *Ex Parte* in CC Docket No. 95-185 at 8. Section 271(c)(1)(A) provides that, as one of the preconditions for BOC entry into the in-region, interLATA services market, a BOC must demonstrate the presence of a facilities-based competitor that provides telephone exchange service to residential and business subscribers. This section further provides that, "[f]or the purpose of this subparagraph, services provided pursuant to subpart K of part 22 of the Commission's regulations [cellular], . . . shall not be considered to be telephone exchange services." 47 U.S.C. § 271(c)(1)(A).

[2422] *See, e.g.*, USTA comments at 66-67; NYNEX comments at 23; PacTel comments at 83, reply at 38; Bell Atlantic/NYNEX Mobile comments at 7; BellSouth comments at 63; Pennsylvania Commission comments at 34.

[2423] *See, e.g.*, PacTel reply at 38; U S West comments at 61; *Ex Parte* letter in CC Docket No. 95-185 from Michael K. Kellogg, Counsel for Bell Atlantic and PacTel, to William F. Caton, Acting Secretary, FCC, February 26, 1996, at 4; BellSouth comments in CC Docket No. 95-185 at 34; Pennsylvania Commission comments at 34-35.

[2424] NYNEX reply at 13.

[2425] Ameritech comments in CC Docket No. 95-185 at 11; BellSouth comments in CC Docket No. 95-185 at 34-35.

determination in the 1996 Act that the terms and conditions of interconnection are to be decided by negotiation among LECs and telecommunications carriers, subject to the state review process.[2426]

3. Discussion

1022. Several parties in this proceeding argue that sections 251 and 252 provide the exclusive jurisdictional basis for regulation of LEC-CMRS interconnection rates.[2427] Other parties assert that sections 332 and 201 provide the exclusive jurisdictional basis for regulation of LEC-CMRS interconnection rates.[2428] Some parties have argued that jurisdiction resides concurrently under sections 251 and 252, on the one hand, and under sections 332 and 201 on the other.[2429]

1023. Sections 251, 252, 332 and 201 are designed to achieve the common goal of establishing interconnection and ensuring interconnection on terms and conditions that are just, reasonable, and fair. It is consistent with the broad authority of these provisions to hold that we may apply sections 251 and 252 to LEC-CMRS interconnection. By opting to proceed under sections 251 and 252, we are not finding that section 332 jurisdiction over interconnection has been repealed by implication, or rejecting it as an alternative basis for jurisdiction. We acknowledge that section 332 in tandem with section 201 is a basis for jurisdiction over LEC-CMRS interconnection; we simply decline to define the precise extent of that jurisdiction at this time.

1024. As a practical matter, sections 251 and 252 create a time-limited negotiation and arbitration process to ensure that interconnection agreements will be reached between incumbent LECs and telecommunications carriers, including CMRS providers. We expect that our establishment of pricing methodologies and default proxies which may be used as interim rates will help expedite the parties' negotiations and drive voluntary CMRS-LEC interconnection agreements. We also believe that sections 251 and 252 will foster regulatory parity in that these provisions establish a uniform regulatory scheme governing interconnection between incumbent LECs and all requesting carriers, including CMRS providers. Thus, we believe that sections 251 and 252 will facilitate consistent resolution of interconnection issues for CMRS providers and other carriers requesting interconnection.

[2426] BellSouth comments in CC Docket No. 95-185 at 35.

[2427] *See, e.g.*, USTA comments at 66-67; NYNEX comments at 23; PacTel comments at 83, reply at 38; Bell Atlantic/NYNEX Mobile comments at 7; BellSouth comments at 63; Pennsylvania Commission comments at 34.

[2428] *See, e.g.*, Cox comments in CC Docket No. 95-185 at 43-44; CTIA comments in CC Docket No. 95-185 at 62; Omnipoint comments at 12; Vanguard comments at 15.

[2429] *See, e.g.*, AT&T comments in CC Docket No. 95-185 at 28-30; AT&T comments at 42-44; *see also* PCIA comments in CC Docket No. 95-185 at 23-26; Century Cellunet comments in CC Docket No. 95-185 at 10-14.

1025. Although we are applying sections 251 and 252 to LEC-CMRS interconnection at this time, we preserve the option to revisit this determination in the future. We note that Section 332 generally precludes states from rate and entry regulation of CMRS providers, and thus, differentiates CMRS providers from other carriers.[2430] We also recognize that, based on the combined record in CC Docket No. 95-185 and CC Docket No. 96-68, there have been instances in which state commissions have treated CMRS providers in a discriminatory manner with respect to the terms and conditions of interconnection.[2431] Should the Commission determine that the regulatory scheme established by sections 251 and 252 does not sufficiently address the problems encountered by CMRS providers in obtaining interconnection on terms and conditions that are just, reasonable and nondiscriminatory, the Commission may revisit its determination not to invoke jurisdiction under section 332 to regulate LEC-CMRS interconnection rates.

1026. Our decision to proceed under section 251 as a basis for regulating LEC-CMRS interconnection rates should not be interpreted as undercutting our intent to enforce Section 332(c)(3), for example, where state regulation of interconnection rates might constitute regulation of CMRS entry. In such situations, state action might be precluded by either section 332 or section 253. Such circumstances would require a case-by-case evaluation. We note, however, that we are aware of numerous specific state requirements that may constitute CMRS entry or rate regulation preempted by section 332. For example, many states, such as California, require all telecommunications providers to certify that the public convenience and necessity will be served as a precondition to construction and operation of telecommunications services within the state.[2432] Some states, such as Alaska and Connecticut, also require CMRS providers to certify as service providers other than CMRS in order to obtain the same treatment afforded other telecommunications providers under state law.[2433] Hawaii and Louisiana, in addition to imposing a certification requirement, require CMRS providers and other telecommunications carriers to file

---

[2430] In passing section 332 in 1993, Congress stated that it intended to "foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure." H.R. Report No. 103-11, 103d. Cong., 1st Sess. 260 (1993).

[2431] *See supra*, Section VII.D.

[2432] CAL. PUBLIC UTILITIES CODE Sections 1001,1005 (West 1995); ALASKA STAT. Section 42.05221 (1995); CONN. GEN. STAT. Section 16-247g (1995); HAW. REV. STAT. Section 269-7.5 (1995); NEB. REV. STAT. Section 86-805 (1995); N.M. STAT. ANN. Section 63-9B-4 (Michie 1996).

[2433] *See In the Matter of Motion for a Declaratory Ruling Concerning Preemption of Alaska Call Routing and Interexchange Certification Regulation as Applies to Cellular Carriers*, File No. WTB/POL 95-2, *Motion for a Declaratory Ruling*, Alaska-3 Cellular d/b/a CellularOne, p.5, para. 11 (filed Sept. 22, 1995); *Decision, Investigation Into Wireless Mutual Compensation Plans*, State of Connecticut, Department of Public Utility control, at 15 (Connecticut Commission Sept. 22, 1995).

tariffs with the state commission.[2434] We will not permit entry regulation through the exercise of states' sections 251/252 authority or otherwise. In this regard, we note that states may not impose on CMRS carriers rate and entry regulation as a pre-condition to participation in interconnection agreements that may be negotiated and arbitrated pursuant to sections 251 and 252. We further note that the Commission is reviewing filings made pursuant to section 253 alleging that particular states or local governments have requirements that constitute entry barriers, in violation of section 253. We will continue to review any allegations on an ongoing basis, including any claims that states or local governments are regulating entry or imposing requirements on CMRS providers that constitute barriers to market entry.

[2434] HAW. REV. STAT. Section 6-80-29 (1996); *see In re Regulations for Competition in the Local Telecommunications Market*, General Order, Louisiana Public Service Commission, §§ 301, 401 (Louisiana Commission March 15, 1996).

XI. OBLIGATIONS IMPOSED ON LECS BY SECTION 251(b)[2435]

A. Reciprocal Compensation for Transport and Termination of Telecommunications

1. Statutory Language

1027. Section 251(b)(5) provides that all LECs, including incumbent LECs, have the duty to "establish reciprocal compensation arrangements for the transport and termination of telecommunications."[2436] Section 252(d)(2) states that, for the purpose of compliance by an incumbent LEC with section 251(b)(5), a state commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless such terms and conditions both: (1) provide for the "mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier," and (2) "determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls."[2437] That subsection further provides that the foregoing language shall not be construed "to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill and keep arrangements),"[2438] or to authorize the Commission or any state to "engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or require carriers to maintain records with respect to the additional costs of such calls."[2439] The legislative history indicates that "mutual and reciprocal recovery of costs . . . may include a range of compensation schemes, such as in-kind exchange of traffic without cash payment (known as bill-and-keep arrangements)."[2440]

[2435] Additional obligations imposed by section 251(b) are addressed in a separate order. *See* NPRM at paras. 202-219.

[2436] 47 U.S.C. § 251(b)(5).

[2437] 47 U.S.C. § 252(d)(2)(A).

[2438] *Id.* at § 252(d)(2)(B)(i).

[2439] *Id.* at § 252(d)(2)(B)(ii).

[2440] Joint Explanatory Statement at 7.

2. Definition of Transport and Termination of Telecommunications

a. Background

1028. In the NPRM, we sought comment on whether "transport and termination of telecommunications" under section 251(b)(5) is limited to certain types of traffic.[2441] We noted that the statutory provision appears to encompass telecommunications traffic that originates on the network of one LEC and terminates on the network of a competing provider in the same local service area as well as traffic passing between LECs and CMRS providers.[2442] We sought comment on whether section 251(b)(5) also encompasses telecommunications traffic passing between neighboring LECs that do not compete with one another.[2443] We also observed in the NPRM that section 252(d)(2) is entitled "Charges for Transport and Termination of Traffic," and it could be interpreted to permit separate charges for these two components of reciprocal compensation.[2444] We sought comment on this issue.

b. Comments

1029. Numerous commenters contend that section 251(b)(5) applies to traffic originating on the network of one LEC and terminating on the network of another LEC, including both the traffic exchanged between competing LECs and traffic exchanged between neighboring LECs that do not compete with one another.[2445] The Oregon Commission points out that neither section 251 nor any other provision of the Act excludes the transport and termination of telecommunications traffic passing between neighboring LECs that do not compete with one another.[2446] Several incumbent LECs, however, contend that the requirements imposed on LECs by section 251(b), including reciprocal compensation for transport and termination of traffic, make no sense except in the context of LECs offering service in the same geographic area, because these requirements are relevant only to the competitive relationship between such carriers.[2447] In addition, several commenters contend that parties and states will need to determine the local service area within

---

[2441] NPRM at para. 231.

[2442] NPRM at para. 230.

[2443] *Id.*

[2444] NPRM at para. 231.

[2445] *See, e.g.*, Ohio Commission comments at 68-69; MFS comments at 76; Time Warner comments at 85-86.

[2446] Oregon Commission comments at 35.

[2447] PacTel comments at 95-96; NYNEX comments at 85; *see also* Florida Commission comments at 38-39.

which the compensation right applies.[2448] RTC asserts that elimination of multicompany existing extended area service (EAS)[2449] would cause great rate disruption around the country.[2450]

1030. A wide range of commenters also contend that reciprocal compensation should apply to arrangements between CMRS providers and LECs.[2451] Numerous commenters in the *LEC-CMRS Interconnection* proceeding have argued that CMRS providers do not receive reciprocal compensation for the transport and termination of traffic from incumbent LECs,[2452] and in some cases incumbent LECs require CMRS providers to compensate the LEC for wireline-originated traffic terminated on their wireless systems.[2453] PageNet, however, contends that section 251 is not directly applicable to interconnection arrangements between incumbent LECs and CMRS providers.[2454] Instead, it argues that incumbent LEC to CMRS interconnection is governed by section 332 of the 1934 Act.[2455] Several wireless providers argue that neither CMRS nor traditional paging service fits the Act's definition of a local exchange service and, therefore, these services are exempt from section 251(b) requirements.[2456] Paging companies commented in the *LEC-CMRS Interconnection* proceeding that, despite the fact that paging companies must terminate incoming incumbent LEC calls, the paging companies pay the LECs for call

---

[2448] *See* GTE comments at 54; Continental comments at 12-13 (asserting that a new entrant should not be required to pay toll access charges to terminate its customers within its local calling area); NCTA reply at 17 (arguing that the Commission should reject incumbent LECs' arguments that reciprocal compensation arrangements between incumbent LECs and competitive LECs are only applicable to the termination of incumbent LEC-defined local traffic). *But see* PacTel reply at 48 (arguing that transport and termination does not extend to all intraLATA calls because such a requirement would read access charges out of the Act).

[2449] EAS is considered an interexchange service between non-competing LECs.

[2450] RTC reply at v; *see also* GVNW comments at 41 (Historical interconnection arrangements between neighboring incumbent LECs should not be used as a basis for determining appropriate compensation between carriers competing in the same service areas under a statutory mandate to base compensation on the cost of terminating a call).

[2451] *See, e.g.*, Ohio Commission comments at 68-69; NYNEX comments at 85; ProNet comments at 11-12.

[2452] *See, e.g.*, RCC comments in CC Docket No. 95-185 at 5; 360 Degrees comments in CC Docket No. 95-185 at 3; Western Wireless comments in CC Docket No. 95-185 at 13; Omnipoint reply in CC Docket No. 95-185 at 3-7.

[2453] *See, e.g.*, CMT Partners comments in CC Docket No. 95-185 at 4; Century Cellunet comments in CC Docket No. 95-185 at 4; Nextel Communications comments in CC Docket No. 95-185 at 5; Centennial Cellular Corp. comments in CC Docket No. 95-185 at 9.

[2454] PageNet comments at 12-14.

[2455] *Id.; see also* PCIA comments at 1-12; Mobilemedia comments at 5-12; Arch comments at 17.

[2456] *See, e.g.*, ProNet comments at 7; Arch comments at 17; BANM comments at 2.

origination, rather than receive compensation for call termination.[2457] They also contend that paging companies should be permitted to charge reasonable call termination fees to the LECs.[2458]

1031. Incumbent LECs as well as other commenters contend that transport and termination should be treated as two distinct functions.[2459] They generally define transport as carrying traffic between switches within a network, while termination is characterized as delivering traffic through the last end-office switch to the end user.[2460] The Texas Public Utility Counsel argues that, to the extent that transport functions and call termination functions have different cost structures, the Act would mandate a two-part pricing structure.[2461] U S West notes that, while there is no natural substitute for termination, transport is interoffice and would generally be interchangeable with similar network elements or tariffed access services.[2462] In addition, Citizens Utilities contends that, depending on the location of the physical interconnection point between two carriers and each carrier's network design, the terminating carrier may or may not perform any transport service in the call delivery process.[2463] Therefore, it argues that the transport function logically should be unbundled from the termination function.[2464] USTA and potential new entrants, however, argue that transport and termination describe a single function, the costs of which should be recovered from a single charge for purposes of reciprocal compensation.[2465] GST believes that subdivision of transport and termination as a means of applying asymmetrical rate structures conflicts with the statute's command of reciprocal compensation, and gives LECs incentives to tilt the balance of payment

---

[2457] *See* PageNet reply in CC Docket No. 95-185 at 5.

[2458] *See, e.g.*, PageNet comments in CC Docket No. 95-185 at 25-29.

[2459] *See, e.g.*, U S West comments at 69; PacTel comments at 97; GTE comments at 18; Florida Commission comments at 39.

[2460] *See, e.g.*, U S West comments at 69; PacTel comments at 97; GTE comments at 18; BellSouth comments at 71.

[2461] Texas Public Utility Counsel comments at 49-50; *see also* Arch comments at 17-18; Florida Commission comments at 39.

[2462] U S West comments at 69. Similarly, CFA/CU argues that the availability of termination for new entrants is a monopoly enjoyed by the incumbent LEC as a legacy of its historic monopoly. CFA/CU comments at 52-53; *see also* MFS reply at 17.

[2463] Citizens Utilities comments at 29; *see also* BellSouth comments at 71.

[2464] *Id.*

[2465] USTA comments at 80; *see also* GST comments at 35-38; MFS comments at 76-77; Time Warner comments at 86-88; TCI comments at 27-28.

through their network design decisions.[2466]

1032. In addition, Sprint contends that section 251(b)(5) arguably applies to transport and termination of toll traffic as well as local traffic.[2467] Sprint contends, however, that in the context of section 252(d)(2), which establishes a pricing rule for reciprocal compensation where one of the carriers is an incumbent LEC, it appears that Congress intended to confine to local traffic the obligation of transport and termination.[2468] Several other commenters also maintain that toll traffic should remain subject to access charges and not section 251(b)(5) obligations, at least until access charge reform can be implemented.[2469] RTC argues that Congress made it clear that it did not intend the Act to change the access charge regime.[2470] Frontier, however, contends that Sprint's reliance on the wording of section 252(d)(2) as limiting the scope of section 251(b)(5) is simply misguided.[2471] Frontier argues that, at best, section 252(d)(2)'s silence regarding the pricing by an incumbent LEC simply meant that Congress did not intend to constrain the Commission decisions in the pricing of transport and termination by a non-incumbent LEC under section 252(d)(2).[2472] In sum, Frontier contends that the general principles of mutual and reciprocal compensation under section 251(b)(5) would apply to all traffic, while section 252(d)(2) applies to incumbent LEC pricing of mutual compensation involving any additional costs of transport and termination.[2473]

c. Discussion

(1) Distinction between "Transport and Termination" and Access

1033. We recognize that transport and termination of traffic, whether it originates locally or from a distant exchange, involves the same network functions. Ultimately, we believe that the rates that local carriers impose for the transport and termination of local traffic and for the transport and termination of long distance traffic should converge. We conclude, however, as a

---

[2466] GST comments at 35-38.

[2467] Sprint comments at 76.

[2468] *Id.* at 76-77.

[2469] *See, e.g.*, Alabama Commission comments at 32-33; PacTel comments at 95-96, 98, reply at 48; MFS comments at 76.

[2470] RTC reply at 9.

[2471] Frontier reply at 19.

[2472] *Id.*

[2473] *Id.*

legal matter, that transport and termination of local traffic are different services than access service for long distance telecommunications. Transport and termination of local traffic for purposes of reciprocal compensation are governed by sections 251(b)(5) and 252(d)(2), while access charges for interstate long-distance traffic are governed by sections 201 and 202 of the Act. The Act preserves the legal distinctions between charges for transport and termination of local traffic and interstate and intrastate charges for terminating long-distance traffic.

1034. We conclude that section 251(b)(5) reciprocal compensation obligations should apply only to traffic that originates and terminates within a local area, as defined in the following paragraph. We disagree with Frontier's contention that section 251(b)(5) entitles an IXC to receive reciprocal compensation from a LEC when a long-distance call is passed from the LEC serving the caller to the IXC. Access charges were developed to address a situation in which three carriers -- typically, the originating LEC, the IXC, and the terminating LEC -- collaborate to complete a long-distance call. As a general matter, in the access charge regime, the long-distance caller pays long-distance charges to the IXC, and the IXC must pay both LECs for originating and terminating access service.[2474] By contrast, reciprocal compensation for transport and termination of calls is intended for a situation in which two carriers collaborate to complete a local call. In this case, the local caller pays charges to the originating carrier, and the originating carrier must compensate the terminating carrier for completing the call. This reading of the statute is confirmed by section 252(d)(2)(A)(i), which establishes the pricing standards for section 251(b)(5). Section 251(d)(2)(A)(i) provides for "recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier."[2475] We note that our conclusion that long distance traffic is not subject to the transport and termination provisions of section 251 does not in any way disrupt the ability of IXCs to terminate their interstate long-distance traffic on LEC networks. Pursuant to section 251(g), LECs must continue to offer tariffed interstate access services just as they did prior to enactment of the 1996 Act. We find that the reciprocal compensation provisions of section 251(b)(5) for transport and termination of traffic do not apply to the transport or termination of interstate or intrastate interexchange traffic.

1035. With the exception of traffic to or from a CMRS network, state commissions have the authority to determine what geographic areas should be considered "local areas" for the purpose of applying reciprocal compensation obligations under section 251(b)(5), consistent with the state commissions' historical practice of defining local service areas for wireline LECs. Traffic originating or terminating outside of the applicable local area would be subject to interstate and intrastate access charges. We expect the states to determine whether intrastate transport and termination of traffic between competing LECs, where a portion of their local

[2474] In addition, both the caller and the party receiving the call pay a flat-rated interstate access charge -- the end-user common line charge -- to the respective incumbent LEC to whose network each of these parties is connected.

[2475] 47 U.S.C. § 252(d)(2)(A)(i).

service areas are not the same, should be governed by section 251(b)(5)'s reciprocal compensation obligations or whether intrastate access charges should apply to the portions of their local service areas that are different. This approach is consistent with a recently negotiated interconnection agreement between Ameritech and ICG that restricted reciprocal compensation arrangements to the local traffic area as defined by the state commission.[2476] Continental Cablevision, in an *ex parte* letter, states that many incumbent LECs offer optional expanded local area calling plans, in which customers may pay an additional flat rate charge for calls within a wider area than that deemed as local, but that terminating intrastate access charges typically apply to calls that originate from competing carriers in the same wider area.[2477] Continental Cablevision argues that local transport and termination rates should apply to these calls. We lack sufficient record information to address the issue of expanded local area calling plans; we expect that this issue will be considered, in the first instance, by state commissions. In addition, we expect the states to decide whether section 251(b)(5) reciprocal compensation provisions apply to the exchange of traffic between incumbent LECs that serve adjacent service areas.

1036. On the other hand, in light of this Commission's exclusive authority to define the authorized license areas of wireless carriers, we will define the local service area for calls to or from a CMRS network for the purposes of applying reciprocal compensation obligations under section 251(b)(5).[2478] Different types of wireless carriers have different FCC-authorized licensed territories, the largest of which is the "Major Trading Area" (MTA).[2479] Because wireless licensed territories are federally authorized, and vary in size, we conclude that the largest FCC-authorized wireless license territory (*i.e.*, MTA) serves as the most appropriate definition for local service area for CMRS traffic for purposes of reciprocal compensation under section 251(b)(5) as it avoids creating artificial distinctions between CMRS providers. Accordingly, traffic to or from a CMRS network that originates and terminates within the same MTA is subject to transport and termination rates under section 251(b)(5), rather than interstate and intrastate access charges.

1037. We conclude that section 251(b)(5) obligations apply to all LECs in the same state-defined local exchange service areas, including neighboring incumbent LECs that fit within this description. Contrary to the arguments of NYNEX and Pacific Telesis, neither the plain language of the Act nor its legislative history limits this subsection to the transport and termination of telecommunications traffic between new entrants and incumbent LECs. In addition, applying

---

[2476] *See* letter from Albert H. Kramer, Dickstein, Shapiro, Morin & Oshinsky LLP to John Nakahata, Senior Legal Advisor to the Chairman, FCC, July 11, 1996.

[2477] Letter from Brenda L. Fox, Vice President, Federal Relations, Continental Cablevision, to Robert Pepper, Chief, Office of Plans and Policy, FCC, July 22, 1996, attached to Letter from Donna N. Lampert, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., to William F. Caton, Acting Secretary, FCC, July 22, 1996.

[2478] *See also infra*, Section XI.A.c.3.

[2479] *See* Rand McNally, Inc., *1992 Commercial Atlas & Marketing Guide* 38-39 (1992).

section 251(b)(5) obligations to neighboring incumbent LECs in the same local exchange area is consistent with our decision that all interconnection agreements, including agreements between neighboring LECs, must be submitted to state commissions for approval pursuant to section 252(e).[2480]

1038. Under section 252, neighboring states may establish different rate levels for transport and termination of traffic.[2481] In cases in which territory in multiple states is included in a single local service area, and a local call from one carrier to another crosses state lines, we conclude that the applicable rate for any particular call should be that established by the state in which the call terminates. This provides an administratively convenient rule, and termination of the call typically occurs in the same state where the terminating carrier's end office switch is located and where the cost of terminating the call is incurred.

(2) Distinction between "Transport" and "Termination"

1039. We conclude that transport and termination should be treated as two distinct functions. We define "transport," for purposes of section 251(b)(5), as the transmission of terminating traffic that is subject to section 251(b)(5) from the interconnection point between the two carriers to the terminating carrier's end office switch that directly serves the called party (or equivalent facility provided by a non-incumbent carrier). Many alternative arrangements exist for the provision of transport between the two networks. These arrangements include: dedicated circuits provided either by the incumbent LEC, the other local service provider, separately by each, or jointly by both; facilities provided by alternative carriers; unbundled network elements provided by incumbent LECs; or similar network functions currently offered by incumbent LECs on a tariffed basis. Charges for transport subject to section 251(b)(5) should reflect the forward-looking cost of the particular provisioning method.

1040. We define "termination," for purposes of section 251(b)(5), as the switching of traffic that is subject to section 251(b)(5) at the terminating carrier's end office switch (or equivalent facility) and delivery of that traffic from that switch to the called party's premises. In contrast to transport, for which some alternatives exist, alternatives for termination are not likely to exist in the near term. A carrier or provider typically has no other mechanism for delivering traffic to a called party served by another carrier except by having that called party's carrier terminate the call. In addition, forward-looking costs are calculated differently for the transport of traffic and the termination of traffic, as discussed above in the unbundled elements section.[2482]

[2480] *See supra*, Section III.D.

[2481] We discuss the methodology states should follow in establishing transport and termination rates *infra*, Section XI.A.3.c.(3).

[2482] *See infra*, Section VII.B.2.

As such, we conclude that we need to treat transport and termination as separate functions -- each with its own cost. With respect to GST's contention that separate charges for transport and termination of traffic will allow incumbent LECs to "game" the system through network design decisions, we conclude in the interconnection section above that interconnecting carriers may interconnect at any technically feasible point.[2483] We find that this sufficiently limits LECs' ability to disadvantage interconnecting parties through their network design decisions.

(3) CMRS-Related Issues

1041. Section 251(b)(5) obligates LECs to establish reciprocal compensation arrangements for the transport and termination of telecommunications traffic. Although section 252(b)(5) does not explicitly state to whom the LEC's obligation runs, we find that LECs have a duty to establish reciprocal compensation arrangements with respect to local traffic originated by or terminating to any telecommunications carriers. CMRS providers are telecommunications carriers and, thus, LECs' reciprocal compensation obligations under section 251(b)(5) apply to all local traffic transmitted between LECs and CMRS providers.

1042. We conclude that, pursuant to section 251(b)(5), a LEC may not charge a CMRS provider or other carrier for terminating LEC-originated traffic. Section 251(b)(5) specifies that LECs and interconnecting carriers shall compensate one another for termination of traffic on a reciprocal basis. This section does not address charges payable to a carrier that originates traffic. We therefore conclude that section 251(b)(5) prohibits charges such as those some incumbent LECs currently impose on CMRS providers for LEC-originated traffic. As of the effective date of this order, a LEC must cease charging a CMRS provider or other carrier for terminating LEC-originated traffic and must provide that traffic to the CMRS provider or other carrier without charge.

1043. As noted above, CMRS providers' license areas are established under federal rules, and in many cases are larger than the local exchange service areas that state commissions have established for incumbent LECs' local service areas.[2484] We reiterate that traffic between an incumbent LEC and a CMRS network that originates and terminates within the same MTA (defined based on the parties' locations at the beginning of the call) is subject to transport and termination rates under section 251(b)(5), rather than interstate or intrastate access charges. Under our existing practice, most traffic between LECs and CMRS providers is not subject to interstate access charges unless it is carried by an IXC, with the exception of certain interstate interexchange service provided by CMRS carriers, such as some "roaming" traffic that transits

[2483] *See supra*, Section IV.F..

[2484] *See* 47 C.F.R. §§ 22.911, 24.202; *see also* PCIA comments in CC Docket No. 95-185 at 21-22; Letter from Leonard J. Kennedy, on behalf of Comcast Cellular Communications, to William Caton, Acting Secretary, FCC, July 25, 1996.

incumbent LECs' switching facilities, which is subject to interstate access charges.[2485] Based on our authority under section 251(g) to preserve the current interstate access charge regime, we conclude that the new transport and termination rules should be applied to LECs and CMRS providers so that CMRS providers continue not to pay interstate access charges for traffic that currently is not subject to such charges, and are assessed such charges for traffic that is currently subject to interstate access charges.[2486]

1044. CMRS customers may travel from location to location during the course of a single call, which could make it difficult to determine the applicable transport and termination rate or access charge.[2487] We recognize that, using current technology, it may be difficult for CMRS providers to determine, in real time, which cell site a mobile customer is connected to, let alone the customer's specific geographic location.[2488] This could complicate the computation of traffic flows and the applicability of transport and termination rates, given that in certain cases, the geographic locations of the calling party and the called party determine whether a particular call should be compensated under transport and termination rates established by one state or another, or under interstate or intrastate access charges. We conclude, however, that it is not necessary for incumbent LECs and CMRS providers to be able to ascertain geographic locations when determining the rating for any particular call at the moment the call is connected. We conclude that parties may calculate overall compensation amounts by extrapolating from traffic studies and samples. For administrative convenience, the location of the initial cell site when a call begins shall be used as the determinant of the geographic location of the mobile customer. As an

---

[2485] "[S]ome cellular carriers provide their customers with a service whereby a call to a subscriber's local cellular number will be routed to them over interstate facilities when the customer is "roaming" in a cellular system in another state. In this case, the cellular carrier is providing not local exchange service but interstate, interexchange service. In this and other situations where a cellular company is offering interstate, interexchange service, the local telephone company providing interconnection is providing exchange access to an interexchange carrier and may expect to be paid the appropriate access charge . . . . Therefore, to the extent that a cellular operator does provide interexchange service through switching facilities provided by a telephone company, its obligation to pay carrier's carrier [*i.e.*, access] charges is defined by § 69.5(b) of our rules." *The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, 59 RR 2d 1275, 1284-85 n.3 (1986). *See also Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1497-98 (1994) (concluding that there should be no distinction between incumbent LECs' interconnection arrangements with cellular carriers and those with other CMRS providers).

[2486] *See also, supra*, XI.A.2.c.(1).

[2487] In the *LEC-CMRS Interconnection NPRM*, we observed that a significant amount of LEC-CMRS traffic crosses state lines, because CMRS service areas often cross state lines and CMRS customers are mobile. *LEC CMRS Interconnection NPRM* at para. 112.

[2488] *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, RM-8143, Report and Order and Further Notice of Proposed Rulemaking, FCC 96-264 at paras. 8-9 (adopted June 12, 1996, released July 26, 1996).

alternative, LECs and CMRS providers can use the point of interconnection between the two carriers at the beginning of the call to determine the location of the mobile caller or called party.

1045. As discussed above, pursuant to section 251(b)(5) of the Act, all local exchange carriers, including small incumbent LECs and small entities offering competitive local exchange services, have a duty to establish reciprocal compensation arrangements for the transport and termination of local exchange service. CMRS providers, including small entities, and LECs, including small incumbent LECs and small entity competitive LECs, will receive reciprocal compensation for terminating certain traffic that originates on the networks of other carriers, and will pay such compensation for certain traffic that they transmit and terminate to other carriers. We believe that these arrangements should benefit all carriers, including small incumbent LECs and small entities, because it will facilitate competitive entry into new markets while ensuring reasonable compensation for the additional costs incurred in terminating traffic that originates on other carriers' networks. We also recognize that, to implement transport and termination pursuant to section 251(b)(5), carriers, including small incumbent LECs and small entities, may be required to measure the exchange of traffic, but we believe that the cost of such measurement to these carriers is likely to be substantially outweighed by the benefits of these arrangements.[2489]

3. Pricing Methodology

a. Background

1046. In the NPRM, we sought comment on how to interpret section 252(d)(2) of the Act.[2490] Specifically, we asked if we should establish a generic pricing methodology or impose a ceiling to guide the states in setting the charge for the transport and termination of traffic. We also asked whether such a generic pricing methodology or ceiling should be established using the same principles we adopt for interconnection and unbundled elements.[2491] Additionally, we sought comment on the use of an interim and transitional pricing mechanism that would address concerns about unequal bargaining power in negotiations.[2492]

[2489] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

[2490] NPRM at para. 234.

[2491] NPRM at para. 234.

[2492] NPRM at para. 244.

b. Comments

1047. Time Warner argues that call termination is an essential element in completing calls and that this last "bottleneck" should be governed by a lower cost standard than elements that are based on a competitor's "make or buy decisions."[2493] MCI contends that the level of compensation for transport and termination should be determined by calculating the TSLRIC incurred by the incumbent in providing the network elements necessary to terminate the local calls originating on the networks of its competitors, and converting that cost to a per-minute rate.[2494] Cox asserts that section 252(d)(2) requires that competing carriers have mutual obligations to terminate traffic that originates on competitors' networks, and that this obligation requires that the rate for transport and termination be less than the rate charged for unbundled elements.[2495] Cox advocates the use of LRIC, as opposed to TSLRIC, methodology to set transport and termination rates because LRIC recognizes only the cost of capital expenditures to provide the additional terminations and transport required by a competitive local service provider, including maintenance and depreciation of those facilities, without any allocation of overhead.[2496]

1048. BellSouth argues that the recovery of transport and termination costs should include joint and common costs and that no LEC can charge rates for transport and termination in excess of access charges because potential customers would simply choose arrangements under the latter.[2497] The Western Alliance asserts that rates for the transport and termination of traffic must allow rural LECs to recover the incremental cost of local access, a reasonable apportionment of joint and common costs, and any lost contribution to basic, local service rates represented by the interconnecting carriers' service.[2498] The Western Alliance argues that recovery of lost contribution is especially important for smaller LECs because they are unlikely to have alternative sources from which to support basic service rates.[2499] USTA argues rates should be based on existing prices (*i.e.* access charges) because this would not require small and mid-sized incumbent

---

[2493] Time Warner comments at 50. "Make or buy decision" is Time Warner's term for deciding between providing services through its own facilities or through resale and/or purchasing unbundled elements.

[2494] MCI comments at 48-49; *see also* NCTA comments at 47-50; Comcast comments at 22; Competition Policy Institute reply at 15.

[2495] Cox comments at 34; *see also* Sprint Spectrum/APC comments at 8-9.

[2496] Cox comments at 25-26; *see also* GST comments at 38-40; MFS comments at 80-81. We note above that TSLRIC is one instance of LRIC where the increment chosen is the provision of the entire service.

[2497] BellSouth comments at 70-72; *see also* MECA comments at 5; and Mass. Commission comments at 8-9.

[2498] Western Alliance comments at 5.

[2499] *Id. at* 7 n. 14.

LECs to conduct cost studies that could bog down the interconnection negotiation process.[2500] GTE claims that the "additional costs incurred" language undermines the contention that cost studies must assume the most efficient technology available because costs are incurred using actual network technology, not a theoretical network.[2501]

1049. The Illinois Commission asserts that the two different pricing standards in sections 252(d)(1)(A)(i) and 252(d)(2)(A)(ii) are not mutually exclusive and the text of the two provisions does not prohibit the states from using identical pricing standards for the two categories of service. The Illinois Commission notes that there is some substitutability between unbundled network elements and incumbent LEC transport and termination of a competitor's traffic. Consequently, the Illinois Commission contends that two widely disparate policies for the pricing of these services may have potentially distorting effects.[2502] The Illinois Commission further argues that section 252(d)(2)(B)(ii) does not prohibit rate regulation proceedings to establish transport and termination costs and does not bar a state from requiring carriers to maintain records regarding transport and termination costs, if authority exists independently of the 1996 Act.[2503] GST argues that section 252(d)(2)(B)(ii)'s prohibition against use of cost studies to set transport and termination rates suggests Congress intended for compensation prices to be set on the basis of economically relevant costs, not on the basis of artificial regulatory mechanisms, such as separations, revenue requirements, or a carrier's embedded investment.[2504]

1050. The Ohio Commission asserts that states should establish a price ceiling for transport and termination of local traffic on the basis of an imputation test. The Ohio Commission argues that the ceiling price for transport and termination of local traffic should be such that it allows the incumbent LEC to pass an imputation test for local traffic in the aggregate (*i.e.*, flat-rated, message, and measured local residence and business traffic) at the end user rate levels.[2505] Similarly, MFS suggests that the Commission adopt a rate equal to one half of the retail rate because, as a general rule, call origination and billing can be presumed to be equal to the cost of transport and termination.[2506] Jones Intercable contends that the Commission should

---

[2500] USTA comments at 54-55.

[2501] GTE reply at 30; *see also* PacTel reply at 45-46.

[2502] Illinois Commission comments at 76-77; *see also* California Commission comments at 42; ACSI comments at 10-11; Ohio Commission comments at 70-71; Texas Public Utility Counsel comments at 1, 50; Lincoln Tel. comments at 20; Citizens Utilities comments at 32-33.

[2503] Illinois Commission comments at 78; *see also* California Commission comments at 43-44.

[2504] GST comments at 39.

[2505] Ohio Commission comments at 71-72, 78-79.

[2506] MFS comments at 87.

establish a presumption that all LECs can offer traffic termination at a rate that is no higher than the lowest rate that has been agreed to (or imposed through arbitration) for such traffic termination by *any* LEC. Jones Intercable adds that such a rule is immensely practical because it relieves competitors of the need to fight the same battle in all fifty states.[2507]

1051. The California Commission asserts that ceilings for transport and termination present problems because a ceiling based on, for example, switched access rates would have to take into account widely varying rates among states. The California Commission is also opposed to price floors for call termination because they may conflict with bill-and-keep arrangements.[2508] GST opposes the use of access charges to set reciprocal transport and termination rates because access charges are fundamentally based on rates of return.[2509] TCI argues that there has been sufficient evidence compiled in state proceedings for the Commission to determine the price ceiling based on existing TSLRIC studies and suggests a price ceiling of 0.4 cents per minute of use.[2510] The Illinois and Maryland commissions have adopted rates for the termination of traffic based on incremental cost studies. The Illinois Commission has adopted a rate equal to 0.5 cents ($0.005) per minute of use for termination from the end office switch. Maryland has adopted a rate equal to 0.3 cents ($0.003) per minute of use for termination from the end office switch. Both commissions adopted slightly higher rates for transport and termination via tandem switches equal to 0.5 cents ($0.005) in Maryland and 0.75 cents ($0.0075) in Illinois.[2511]

1052. Most commenters support the requirement that dedicated transport services be priced on a flat-rated basis.[2512] For example, the Ohio Commission asserts that all LECs should offer a reciprocal compensation structure that consists of both flat-rated elements and usage-sensitive elements, in order to satisfy the requirement that the rate structure reflect the way in which costs are incurred by the providing LEC.[2513] According to Lincoln Telephone, the connection between an incumbent LEC's central office and an interconnector's network should be

---

[2507] Jones Intercable comments at 29-30.

[2508] California Commission comments at 43; *see also* Florida Commission comments at 40 (setting charges for the transport and termination of local exchange traffic should be left up to the states because of the unique geographical and demographic characteristics of each state).

[2509] GST comments at 39-40.

[2510] TCI comments at 40-43.

[2511] These cost studies, and others, are discussed in greater detail in *supra.*, Section VII.C.3.

[2512] *See, e.g.*, USTA comments at 80; Time Warner comments at 91-92; NEXTLINK comments at 34-35; Mass. Attorney General comments at 16-17, 22-23; CFA/CU comments at 51; Washington Commission comments at 3; Sprint comments at 79.

[2513] Ohio Commission comments at 68-69.

priced as a flat-rated unbundled network element.[2514] The Massachusetts Attorney General recommends that termination charges be flat-rated and capacity-based.[2515] This capacity-based, flat-rated reciprocal compensation charge would be based on port charges, measured at the peak busy hour of the month, to determine the relative traffic flow over the respective networks. The Massachusetts Attorney General further argues that, in a highly competitive market where services and prices would be continuously changing, rates charged by minutes of use will distort marketing and investment decisions away from the efficient path.[2516] Cox contends capacity-cost approaches should be used as the basic standard for setting transport and termination rates because costs are incurred in that manner.[2517] Additionally, Cox argues a capacity-cost approach addresses peak-load pricing problems because an interconnecting carrier is effectively reserving and paying for a slice of capacity on a full-time basis.[2518] Other carriers support a per-minute charge for transport and termination.[2519] In addition to a rate based on minutes of use, the Maryland Commission does not oppose flat-rated options for termination of traffic based on capacity costs measured at peak hours.[2520] BellSouth adds that usage-based charging is relatively more favorable to smaller competitors and facilities-based charging is relatively more favorable to larger competitors.[2521]

1053. Numerous new entrants and state commissions support the use of an interim pricing mechanism and support the use of bill and keep as such an interim measure.[2522] In the *LEC-CMRS Interconnection* proceeding, most CMRS providers argue in support of an interim pricing approach for transport and termination arrangements while long-term solutions are pursued.[2523]

[2514] Lincoln Tel. comments at 22.

[2515] Mass. Attorney General comments at 15-16.

[2516] Mass. Attorney General comments at 16-17; *see also* CFA/CU comment at 55-56; Washington Commission comments at 3.

[2517] Cox comments at Exhibit 3 (Bargaining Incentives and Interconnection), p. 7.

[2518] *Id.*

[2519] *See, e.g.*, MCI comments at 48-49; SBC comments at 50 n.91.

[2520] Maryland Commission comments at Attachment (Maryland Commission Order No. 72348), p. 33.

[2521] BellSouth comments at Attachment (Interconnection and Economic Efficiency), p. 11.

[2522] *See, e.g.*, GST comments at 34-35; AT&T comment at 69; Cox comments at 27-28, 38; Sprint comments at 87; Jones Intercable comments at 28-29; Citizens Utilities comments at 30; Telecommunication Resellers Ass'n comments at 54-55.

[2523] *See, e.g.*, AirTouch comments in CC Docket No. 95-185 at 38-39.

Cincinnati Bell asserts that the suggestion that an interim mechanism may be necessary to offset bargaining power of incumbent LECs incorrectly assumes that the incumbent LEC will always have greater bargaining power in the process of negotiations.[2524] Cincinnati Bell argues that, to the contrary, small and mid-size LECs will be at a disadvantage when they negotiate with large corporations.[2525] LECs generally argue that, under the 1996 Act, the Commission is precluded from creating an interim pricing regime, and point to section 251(d)(3), which preserves state regulations over the obligations of LECs in certain circumstances, to support their argument.[2526]

c. Discussion

(1) Statutory Standard

1054. We conclude that the pricing standards established by section 252(d)(1) for interconnection and unbundled elements, and by section 252(d)(2) for transport and termination of traffic, are sufficiently similar to permit the use of the same general methodologies for establishing rates under both statutory provisions. Section 252(d)(2) states that reciprocal compensation rates for transport and termination shall be based on "a reasonable approximation of the additional costs of terminating such calls."[2527] Moreover, there is some substitutability between the new entrant's use of unbundled network elements for transporting traffic and its use of transport under section 252(d)(2). Depending on the interconnection arrangements, carriers may transport traffic to the competing carriers' end offices or hand traffic off to competing carriers at meet points for termination on the competing carriers' networks. Transport of traffic for termination on a competing carrier's network is, therefore, largely indistinguishable from transport for termination of calls on a carrier's own network. Thus, we conclude that transport of traffic should be priced based on the same cost-based standard, whether it is transport using unbundled elements or transport of traffic that originated on a competing carrier's network. We, therefore, find that the "additional cost" standard permits the use of the forward-looking, economic cost-based pricing standard that we are establishing for interconnection and unbundled elements.[2528]

[2524] Cincinnati Bell comments at 25-26.

[2525] *Id.*

[2526] *See, e.g.*, BellSouth comments in CC Docket No. 95-185 at 32.

[2527] 47 U.S.C. § 252(d)(2)(A)(ii).

[2528] *See supra*, Section VII.B.

(2) Pricing Rule

1055. States have three options for establishing transport and termination rate levels. A state commission may conduct a thorough review of economic studies prepared using the TELRIC-based methodology outlined above in the section on the pricing of interconnection and unbundled elements.[2529] Alternatively, the state may adopt a default price pursuant to the default proxies outlined below. If the state adopts a default price, it must either commence review of a TELRIC-based economic cost study, request that this Commission review such a study, or subsequently modify the default price in accordance with any revised proxies we may adopt. As previously noted, we intend to commence a future rulemaking on developing proxies using a generic cost model, and to complete such proceeding in the first quarter of 1997. As a third alternative, in some circumstances states may order a "bill and keep" arrangement, as discussed below.

(3) Cost-Based Pricing Methodology

1056. Consistent with our conclusions about the pricing of interconnection and unbundled network elements, we conclude that states that elect to set rates through a cost study must use the forward-looking economic cost-based methodology, which is described in greater detail above, in establishing rates for reciprocal transport and termination when arbitrating interconnection arrangements.[2530] We find that section 252(d)(2)(B)(ii), which indicates that section 252(d)(2) shall not be construed to "authorize the Commission or any State to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls,"[2531] does not preclude states or this Commission from reviewing forward-looking economic cost studies. First, we believe that Congress intended the term "rate regulation proceeding" in section 252(d)(2)(B)(ii) to mean the same thing as "a rate-of-return or other rate-based proceeding" in section 252(d)(1)(A)(i). In the section on the pricing of interconnection and unbundled elements above, we conclude that the statutory prohibition of the use of such proceedings is intended to foreclose the use of traditional rate case proceedings using rate-of-return regulation. Moreover, forward-looking economic cost studies typically involve "a reasonable approximation of the additional cost,"[2532] rather than determining such costs "with particularity," such as by measuring labor costs with detailed time and motion studies.

1057. We find that, once a call has been delivered to the incumbent LEC end office

---

[2529] *Id.*

[2530] *See supra*, Section VII.B. for a complete discussion of forward-looking economic cost-based methodology.

[2531] 47 U.S.C. § 252(d)(2)(B)(ii).

[2532] 47 U.S.C. § 252(d)(2)(A)(ii).

serving the called party, the "additional cost" to the LEC of terminating a call that originates on a competing carrier's network primarily consists of the traffic-sensitive component of local switching. The network elements involved with the termination of traffic include the end-office switch and local loop. The costs of local loops and line ports associated with local switches do not vary in proportion to the number of calls terminated over these facilities.[2533] We conclude that such non-traffic sensitive costs should not be considered "additional costs" when a LEC terminates a call that originated on the network of a competing carrier. For the purposes of setting rates under section 252(d)(2), only that portion of the forward-looking, economic cost of end-office switching that is recovered on a usage-sensitive basis constitutes an "additional cost" to be recovered through termination charges.

1058. Rates for termination established pursuant to a TELRIC-based methodology may recover a reasonable allocation of common costs. A rate equal to incremental costs may not compensate carriers fully for transporting and terminating traffic when common costs are present. We therefore reject the argument by some commenters that "additional costs" may not include a reasonable allocation of forward-looking common costs. We recognize that, as noted by Time Warner, call termination is an essential element in completing calls because competitors are required to use the incumbent LECs' existing networks to terminate calls to incumbent LEC customers.[2534] The 1996 Act envisions a seamless interconnection of competing networks, rather than the development of redundant, ubiquitous networks throughout the nation. In order to terminate traffic ubiquitously to other companies' local customers, all LECs are given the right to use termination services from those companies rather than construct facilities to everyone. While, on the originating end, carriers have different options to reach their revenue-paying customers -- including their own network facilities, purchasing access to unbundled elements of the incumbent LEC, or resale -- they have no realistic alternatives for terminating traffic destined for competing carriers' subscribers other than to use those carriers' networks. Thus, all carriers -- incumbent LECs as well as competing carriers -- have a greater incentive and opportunity to charge prices in excess of economically efficient levels on the terminating end. To ensure that rates for reciprocal compensation make possible efficient competitive entry, we conclude that termination rates should include an allocation of forward-looking common costs that is no greater proportionally than that allocated to unbundled local loops, which, as discussed above, should be relatively low.[2535] Additionally, we conclude that rates for the transport and termination of traffic shall not include an element that allows incumbent LECs to recover any lost contribution to basic, local service rates represented by the interconnecting carriers' service, because such an element would be

---

[2533] The duty to terminate calls that originate on the network of a competitor does not directly affect the number of calls routed to a particular end user and any costs that result from inadequate loop capacity are, therefore, not considered "additional costs."

[2534] Time Warner comments at 50.

[2535] *See supra*, Section VII.C.2.b.(1).

inconsistent with the statutory requirement that rates for transport and termination be based on additional costs.[2536] In the section addressing prices for unbundled elements we conclude that the ECPR, which would allow incumbent LECs to recover such lost contributions, or collection of universal service costs through interconnection rates, leads to significant distortions in markets when existing retail prices are not cost-based.[2537]

1059. We also address the impact on small incumbent LECs. For example, the Western Alliance argues that it is especially important for small LECs to recover lost contributions and common costs through termination charges. We have considered the economic impact of our rules in this section on small incumbent LECs. For example, we conclude that termination rates for all LECs should include an allocation of forward-looking common costs, but find that the inclusion of an element for the recovery of lost contribution may lead to significant distortions in local exchange markets. We also note that certain small incumbent LECs are not subject to our rules under section 251(f)(1) of the 1996 Act, unless otherwise determined by a state commission, and certain other small incumbent LECs may seek relief from their state commissions from our rules under section 251(f)(2) of the 1996 Act.

(4) Default Proxies

1060. As with unbundled network elements, we recognize that it may not be feasible for some state commissions conducting or reviewing economic studies to establish transport and termination rates using our TELRIC-based pricing methodology within the time required for the arbitration process, particularly given some states' resource limitations. Thus, for the time being, we adopt a default price range of 0.2 cents ($0.002) to 0.4 cents ($0.004) per minute of use for calls handed off at the end-office switch. This default price range is based on the same proxies that apply to local switching as an unbundled network element. In establishing end-office termination rates, states may adopt a default termination price that is within our default price range or at either of the end points of the range. States should articulate the basis for selecting a particular price within this range. Thus, in arbitration proceedings, states must set the price for end office termination of traffic by: (1) using a forward-looking, economic cost study that complies with the forward-looking, economic-cost methodology set forth above; or (2) adopting a price less than or equal to 0.4 cents ($0.004) per minute, and greater than or equal to 0.2 cents ($0.002) per minute, pending the completion of such a forward-looking, economic cost study. We observe that the most credible studies in the record before us fall at the lower end of this range, and we encourage states to consider such evidence in their analysis. The adoption of a range of rates to serve as a default price range for interconnection agreements being arbitrated by the states provides carriers with a clearer understanding of the terms and conditions that will

---

[2536] *See* 47 U.S.C. § 252(d)(2).

[2537] *See supra*, Section VII.B.2.b. for a discussion of the effect application of the ECPR would have on the market for local exchange service.

govern them if they fail to reach an agreement and helps to reduce the transaction costs of arbitration and litigation. We also find that states that have already adopted end-office termination rates based on an approach other than a full forward-looking cost study, either through arbitration or rulemaking proceedings, may keep such rates in effect, pending their review of a forward-looking cost study, as long as they do not exceed 0.5 cents ($0.005) per minute. As discussed below, a state may also order a "bill and keep" arrangement subject to certain limitations. Additionally, our adoption of a default price range temporarily relieves small and mid-sized carriers from the burden of conducting forward-looking economic cost studies.[2538]

1061. Similarly, in establishing transport rates under sections 251(b)(5) and 252(d)(2), state commissions should be guided by the price proxies that we are establishing for unbundled transport elements discussed above.[2539] States should explain the basis for selecting a particular default price subject to the applicable ceiling. Specifically, when interconnecting carriers hand off traffic at an incumbent LEC's tandem switch (or equivalent facilities of a carrier other than an incumbent LEC), the rates for the tandem switching and transmission from the tandem switch to end offices -- a portion of the "transport" component of transport and termination rates -- should be subject to the proxies that apply to the analogous unbundled network elements. Thus, for the time being, when states set rates for tandem switching under section 252(d)(2), they may set a default price at or below the default price ceiling that applies to the tandem switching unbundled element as an alternative to reviewing a forward-looking economic cost study using our TELRIC methodology.[2540] Similarly, when states set rates for transmission facilities between tandem switches and end offices, they may establish rates equal to the default prices we are adopting for such transmission, as discussed above in the section on unbundled elements.[2541]

1062. Finally, in establishing the rates for transmission facilities that are dedicated to the transmission of traffic between two networks, state commissions should be guided by the default price level we are adopting for the unbundled element of dedicated transport.[2542] For such dedicated transport, we can envision several scenarios involving a local carrier that provides transmission facilities (the "providing carrier") and another local carrier with which it interconnects (the "interconnecting carrier"). The amount an interconnecting carrier pays for dedicated transport is to be proportional to its relative use of the dedicated facility. For example, if the providing carrier provides one-way trunks that the interconnecting carrier uses exclusively for sending terminating traffic to the providing carrier, then the interconnecting carrier is to pay the

---

[2538] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

[2539] *See supra*, Section VII.C.2.b.(3).

[2540] *Id.*

[2541] *Id.*

[2542] *Id.*

providing carrier a rate that recovers the full forward-looking economic cost of those trunks. The interconnecting carrier, however, should not be required to pay the providing carrier for one-way trunks in the opposite direction, which the providing carrier owns and uses to send its own traffic to the interconnecting carrier. Under an alternative scenario, if the providing carrier provides two-way trunks between its network and the interconnecting carrier's network, then the interconnecting carrier should not have to pay the providing carrier a rate that recovers the full cost of those trunks. These two-way trunks are used by the providing carrier to send terminating traffic to the interconnecting carrier, as well as by the interconnecting carrier to send terminating traffic to the providing carrier. Rather, the interconnecting carrier shall pay the providing carrier a rate that reflects only the proportion of the trunk capacity that the interconnecting carrier uses to send terminating traffic to the providing carrier. This proportion may be measured either based on the total flow of traffic over the trunks, or based on the flow of traffic during peak periods.[2543] Carriers operating under arrangements which do not comport with the principles we have set forth above, shall be entitled to convert such arrangements so that each carrier is only paying for the transport of traffic it originates, as of the effective date of this order.

(5) Rate Structure

1063. Nearly all commenters agree that flat rates, rather than usage-sensitive rates, should apply to the purchase of dedicated facilities. As discussed in the NPRM, economic efficiency may generally be maximized when non-traffic sensitive services, such as the use of dedicated facilities for the transport of traffic, are priced on a flat-rated basis.[2544] We, therefore, require all interconnecting parties to be offered the option of purchasing dedicated facilities, for the transport of traffic, on a flat-rated basis. As discussed by Lincoln Telephone, the connection between an incumbent LEC's end or tandem office and an interconnecting LEC's network is likely to be a dedicated facility. We recognize that the facility itself can be provided in a number of different ways -- by use of two service providers, by the other carrier, or jointly in a meet-point arrangement. We conclude first that, no matter what the specific arrangements, these costs should be recovered in a cost-causative manner and that usage-based charges should be limited to situations where costs are usage sensitive. In cases going to arbitration and in reviewing BOC statements of terms and conditions, the carrier actually providing the facility should presumptively be entitled to a rate that is set based on the forward-looking economic cost of providing the portion of the facility that is used for terminating traffic that originates on the network of a competing carrier. We recognize that negotiated agreements may incorporate flat-rated charges when it is efficient to do so and find that the presence of the arbitration default rule is likely to lead parties to negotiate efficient rate structures.

1064. We recognize that the costs of transporting and terminating traffic during peak and

[2543] *See infra*, Section XI.A.3.c.(5).

[2544] NPRM at para. 150.

off-peak hours may not be the same. As suggested by the Massachusetts Attorney General, rates that are the same during peak and off-peak hours may not reflect the cost of using the network and could lead to inefficient use of the network. The differences in the cost of transporting and terminating traffic during peak and off-peak hours, however, are likely to vary depending on the network, and the amount and type of traffic terminated at a particular switch. For example, peak periods may vary within a local service area depending upon whether the switch is located in a business or residential area. As a result, there may be administrative difficulties in establishing peak-load pricing schemes that may outweigh the benefits of such schemes. The negotiating parties, however, are likely to be in a position to more accurately determine how traffic patterns will adjust to peak-load pricing schemes and we encourage parties to address such pricing schemes in the negotiation process. For similar reasons, we neither require nor forbid states from adopting rates that reflect peak and off-peak costs. We hope some states will evaluate the benefits and costs of pricing schemes that consist of different rates for peak and off-peak traffic. We do require, however, that peak-load pricing schemes, adopted through the arbitration process, comply with our default price level if not based on a forward-looking cost study (*e.g.*, the average rate, weighted by the projected relative minutes of use during peak and off-peak periods, should fall within our default price range of 0.2 to 0.4 cents or the level determined by an incremental cost study).

(6) Interim Transport and Termination Rate Levels

1065. We are concerned that some new entrants that do not already have interconnection arrangements with incumbent LECs may face delays in initiating service solely because of the need to negotiate transport and termination arrangements with the incumbent LEC. In particular, a new entrant that has already constructed facilities may have a relatively weak bargaining position because it may be forced to choose either to accept transport and termination rates not in accord with these rules or to delay its commencement of service until the conclusion of the arbitration and state approval process. To promote the Act's goal of rapid competition in the local exchange, we order incumbent LECs upon request from new entrants to provide transport and termination of traffic, on an interim basis, pending resolution of negotiation and arbitration regarding transport and termination prices, and approval by the state commission. A carrier may take advantage of this interim arrangement only after it has requested negotiation with the incumbent LEC. The interim arrangement shall cease to be in effect when one of the following occurs: (1) an agreement has been negotiated and approved; (2) an agreement has been arbitrated and approved; or (3) the period for requesting arbitration has passed with no such request. We also conclude that interim prices for transport and termination shall be symmetrical. Because the purpose of this interim termination requirement is to permit parties without existing interconnection agreements to enter the market expeditiously, this requirement shall not apply with respect to requesting carriers that have existing interconnection arrangements that provide for termination of local traffic by the incumbent LEC. The ability to interconnect with an incumbent LEC prior to the completion of a forward-looking, economic cost study, based on an interim presumptive price ceiling, allows carriers, including small entrants, to enter into local exchange

service expeditiously.[2545]

1066. In states that have already conducted or reviewed forward-looking economic cost studies and promulgated transport and termination rates based on such studies, an incumbent LEC receiving a request for interim transport and termination shall use these state-determined rates as interim transport and termination rates. In states that have not conducted or reviewed a forward-looking economic cost study, but have set rates for transport and termination of traffic consistent with the default price ranges and ceilings discussed above, an incumbent LEC shall use these state-determined rates as interim rates.[2546] In states that have neither set rates consistent with the default price ceilings and ranges nor reviewed or conducted forward-looking economic cost studies, we must establish an interim default price in order to facilitate rapid competition in the local exchange market. In those states, an incumbent LEC shall set interim rates at the default ceilings for end-office switching (0.4 cents per minute of use), tandem switching (0.15 cents per minute of use), and transport described above.[2547] Using the ceiling as a default interim price, pending a state commission's completion of a forward-looking economic cost analysis, should ensure that both the incumbent LEC and the competing provider recovers no less than their full transport and termination costs. We note, however, that the most credible evidence in the record suggests that the actual forward-looking economic cost of end-office switching is closer to 0.2 cents ($0.002) per minute of use than the ceiling of 0.4 cents ($0.004) per minute of use.[2548] States must adopt "true-up" mechanisms to ensure that no carrier is disadvantaged by an interim rate that differs from the final rate established pursuant to arbitration.

1067. We conclude that section 251, in conjunction with our broad rulemaking authority under section 4(i), provides us with authority to create interim pricing rules to facilitate market entry. Because section 251(d)(1) gives the FCC authority "to establish regulations to implement the requirements of this section," we find that section 251(d)(1) gives the Commission authority to establish interim regulations that address the "just and reasonable" rates for the "reciprocal compensation" requirement of section 251(b)(5), subject to the preservation requirements of section 251(d)(3). Courts have upheld our adoption of interim compensation arrangements pursuant to our authority under section 4(i) of the 1934 Communications Act on numerous occasions in the past.[2549] In particular, we have authority, under section 4(i), to set interim rates

---

[2545] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

[2546] *See supra*, Section XI.A.3.c.(4).

[2547] *Id.*

[2548] *See supra*, Section XI.A.3.c.(4).

[2549] *See New England Tel. and Tel . Co. v. FCC*, 826 F.2d 1101 (D.C. Cir 1987); *North American Telecommunications Association v. FCC*, 772 F.2d 1092 (7th Cir. 1085); *Lincoln Tel. and Tel. Co. v. FCC*, 659 F.2d (D.C. Cir. 1989).

subject to a later "true-up" when final rates are established.[2550] We therefore conclude that the default prices discussed above need not in all instances await the conclusion of the negotiation, arbitration, and state approval process set forth in section 252, but must nevertheless be in accordance with the requirements of section 251(d)(3) preserving state access regulations. We also observe that we proposed a similar interim transport and termination arrangement, albeit with different rate levels, in our NPRM in the *LEC-CMRS Interconnection* proceeding.[2551]

1068. We have considered the economic impact of our rules in this section on small incumbent LECs. For example, Cincinnati Bell asserts that interim mechanisms are not required because large corporations are not disadvantaged by unequal bargaining power in negotiations with small and mid-size incumbent LECs. We do not adopt Cincinnati Bell's position because some new entrants, regardless of their size, that do not already have interconnection arrangements with incumbent LECs may face delays in initiating service solely because of the need to negotiate transport and termination arrangements with the incumbent LEC. We believe that the adoption of interim rates, subject to a "true-up," advances the pro-competitive goals of the statute. We also note that certain small incumbent LECs are not subject to our rules under section 251(f)(1) of the 1996 Act, unless otherwise determined by a state commission, and certain other small incumbent LECs may seek relief from their state commissions from our rules under section 251(f)(2) of the 1996 Act.

4. Symmetry

a. Background

1069. Symmetrical compensation arrangements are those in which the rate paid by an incumbent LEC to another telecommunications carrier for transport and termination of traffic originated by the incumbent LEC is the same as the rate the incumbent LEC charges to transport and terminate traffic originated by the other telecommunications carrier. Incumbent LECs are not likely to purchase interconnection or unbundled elements from competitive LECs, except for termination of traffic, and possibly transport.[2552] In the NPRM, we sought comment on whether

---

[2550] "[T]he Commission's establishment of an interim billing and collection arrangement was both a helpful and necessary step for the Commission to take in implementing its 'immediate' interconnection order." *Lincoln Telephone & Telegraph Co. v. FCC*, 659 F.2d 1092, 1107 (D.C.Cir.1981) (upholding Commission decision requiring an incumbent LEC to interconnect with MCI immediately, in order not to delay interconnection, at interim rates subject to later adjustment); *see also FTC Communications v. FCC*, 750 F.2d 226 (2d Cir.1984) (affirming Commission's authority under Section 4(i) to set interim rates for interconnection between the domestic record carrier, Western Union, and international record carriers, subject to an accounting order, pending the conclusion of a rulemaking to set permanent rates replacing expired, contract-based rates).

[2551] *LEC-CMRS Interconnection NPRM* at para. 60.

[2552] NPRM at para. 235.

rate symmetry requirements are consistent with the statutory requirement that rates set by states for transport and termination of traffic be based on "costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier," and "a reasonable approximation of the additional costs of terminating such calls."[2553]

1070. In addition, we noted in the NPRM that the Illinois, Maryland, and New York commissions have established different rates for termination of traffic on an incumbent LEC's network, depending upon whether the traffic is handed off at the incumbent LEC's end office or tandem switch.[2554] We also observed that California and Michigan have established one rate that applies to transport and termination of all competing local exchange carrier traffic on incumbent LEC networks, regardless of whether the traffic is handed off at the incumbent LEC's end office or tandem switch, although this rate does not currently apply to CMRS.[2555] We, therefore, address whether rates for transport and termination should be symmetrical and consist of only a single rate regardless of where the call is handed off, or if rates should be priced on an element-by-element basis.

1071. In the *LEC-CMRS Interconnection NPRM*, we sought comment on whether incumbent LECs were utilizing their greater bargaining power to negotiate with wireless carriers interconnection agreements that did not reflect principles of mutual compensation. We sought comment on whether we should institute some procedure or mechanism in addition to our section 208 enforcement process to ensure that incumbent LECs comply with our existing rules requiring mutual compensation.[2556]

b. Comments

1072. *Local Competition NPRM.* Incumbent LECs argue that a symmetrical reciprocal compensation requirement does not comport with the Act.[2557] GTE contends that the symmetry rule violates the requirement of section 252(d)(2) that rates be based on a reasonable estimate of the additional costs of transport and termination.[2558] In addition, Lincoln Telephone argues that rates for the transport and termination of traffic should not be symmetrical because small and

---

[2553] 47 U.S.C. § 252(d)(2).

[2554] NPRM at para. 239.

[2555] *Id.*

[2556] *LEC-CMRS Interconnection NPRM*, para. 81.

[2557] *See, e.g.*, BellSouth comments at 72-73; SBC comments at 51-52; GTE reply at 29.

[2558] GTE reply at 29.

mid-sized companies can incur higher costs transporting and terminating traffic than larger carriers.[2559] TDS argues that a symmetrical pricing standard fails to fulfill the basic statutory directive that each carrier recover its costs.[2560] BellSouth contends that, because the costs of an incumbent LEC and new entrant are likely to be quite different, the Commission does not have the authority to contravene the mutual and reciprocal recovery language of section 252(d)(2) and require symmetry.[2561] Furthermore, MECA, which represents Michigan exchange carriers, asserts that competing LECs should be required to compensate each other for terminating traffic at a cost-based rate for each carrier.[2562] MECA argues that compensation rates cannot be uniform because each carrier has its own unique cost structure.[2563] RTC also asserts that proposals such as symmetry do not consider the costs involved in the use of another's carriers network.[2564]

1073. On the other hand, state commissions, as well as several other commenters, support symmetrical reciprocal compensation mechanisms.[2565] Several commenters contend that symmetrical rates are mutual and reciprocal, and therefore only symmetrical rates can satisfy the statutory standards required under section 252(d)(2).[2566] MFS notes that Congress required that compensation rates be "mutual and reciprocal" and based on a "reasonable approximation of additional costs," and expressly prohibited any requirement of actual cost studies.[2567] According to MFS "these interrelated provisions indicate Congress's intention that optimal economic costs, rather than actual or historical costs, should be used in setting these rates."[2568] MFS also argues that, while actual costs may vary from one carrier to the next, the optimal economic cost of performing the transport and termination function is the same for all carriers operating within the

---

[2559] Lincoln Tel. reply at 11-12.

[2560] TDS comments at 23.

[2561] BellSouth comments at 72-73.

[2562] MECA comments at 67.

[2563] *Id.*; *see also* Lincoln Tel. reply at 11.

[2564] RTC comments at 23.

[2565] *See, e.g.*, Alabama Commission comments at 32; AT&T comments at 69; Louisiana Commission comments at 7-8; Mass. Commission comments at 13; MCI comments at 50.

[2566] MFS comments at 82-83; GST comments at 40-42; *see also* Texas Public Utility Counsel comments at 52-54 (arguing that symmetrical rates are consistent with the Act as long as rates are based on TSLRIC).

[2567] MFS comments at 82.

[2568] *Id.*

same geographic area.[2569] Therefore, it asserts that *"[o]nly* symmetrical rates are 'mutual and reciprocal,' and only such rates are consistent with the provisions of Sec. 252(d)(2)."[2570]

1074. Several potential new entrants believe that requiring symmetrical reciprocal compensation is needed to ensure efficient competition.[2571] MCI argues that the reciprocal compensation will be of much greater importance to competing carriers than to incumbent LECs because initially calls terminating on other carriers' networks will account for a far greater share of entrants' traffic than is the case for incumbent LECs, which will still be terminating most of their local traffic on their own networks.[2572] Therefore, MCI asserts that the compensation rate charged for transport and termination will comprise a significant portion of the competing carrier's overall cost of providing service.[2573] MCI argues that incumbent LECs have every reason to attempt to use their superior bargaining position in negotiations to obtain termination rates that are as high as possible, and asserts that a symmetrical compensation rate will reduce the incentive of incumbent LECs to inflate their termination rates.[2574] In addition, MFS asserts that asymmetrical rates burden new entrants because incumbent LECs have greater bargaining power and access to information.[2575] The Alabama Commission contends that equal rates eliminate incumbent LECs' ability to exploit the system.[2576]

1075. Some prospective local entrants contend that requiring symmetrical reciprocal compensation arrangements will lead to economically efficient outcomes.[2577] MFS contends that setting symmetrical rates based on the cost of optimal technology gives all carriers an incentive to use the most efficient network design in order to reduce costs.[2578] Further, GST argues that the long-term efficient cost of transporting and terminating traffic should be identical for all

---

[2569] *Id.*; *see also* Texas Public Utility Counsel comments at 52-54 (arguing that symmetrical rates based on TSLRIC should not vary much across companies).

[2570] MFS comments at 82 (emphasis in original); *see also* WinStar comments at 24-26; GST comments at 40-42.

[2571] *See, e.g.*, MCI comments at 50-51; MFS comments at 82-84.

[2572] MCI comments at 49-50.

[2573] *Id.*

[2574] *Id.*

[2575] MFS comments at 83.

[2576] Alabama Commission comments at 32.

[2577] *See, e.g.*, MFS comments at 83-84; WinStar comments at 26.

[2578] MFS comments at 84.

providers, based upon their adoption of the most efficient technology, even if their short-term costs based upon today's technology are different.[2579] WinStar argues that asymmetrical cost-based compensation would penalize new entrants for deploying state-of-the-art technology. According to WinStar, such a system would require new entrants to absorb the costs of the incumbent LECs' less efficient networks by paying higher termination rates, while entrants would be required to pass cost savings from their more efficient networks to the less efficient incumbent LECs by charging lower terminations rates.[2580] WinStar asserts that incumbent LECs have no incentive to increase the efficiency of their own operations as long as they remain free to recover the costs of terminating traffic through higher termination rates than those of their competitors.[2581]

1076. Many state commissions and potential new entrants contend that symmetrical rates should be based on the incumbent LEC's costs. AT&T argues that such an approach provides carriers with the proper incentives to minimize costs and has the added benefit of being administratively manageable, given that incumbent LECs will already be performing TSLRIC studies.[2582] In addition, the Massachusetts Commission notes that entrants may not have the expertise or ability to calculate costs for specific services, and supports use of the incumbent LECs' costs to calculate reciprocal compensation rates. The Alabama Commission asserts, however, that reciprocal compensation rates should be set equal to the transport and termination rates charged by entrants.[2583] Noting that some new entrants may have higher costs than incumbent LECs, several commenters argue that, while reciprocal compensation generally should be symmetrical based on incumbent LECs' costs, new entrants should be able to prove their costs are higher than the incumbent LECs' rates.[2584] Lincoln Telephone, on the other hand, opposes a symmetry requirement because it "achieves expediency at the expense of economic efficiency, thereby eliminating some of the benefits of competition under the Act."[2585]

1077. Several commenters, including many states, contend that this issue should be left to the states or parties to decide.[2586] The California Commission suggests that symmetry should be

---

[2579] GST comments at 35-38.

[2580] WinStar comments at 26.

[2581] *Id.*

[2582] AT&T comments at 69; *see also* Texas Public Utility Counsel comments at 52-54.

[2583] Alabama Commission comments at 32.

[2584] *See, e.g.*, Mass. Commission comments at 13; Sprint comments at 83.

[2585] Lincoln Tel. comments at 22.

[2586] *See, e.g.*, Ohio Commission comments at 73-75; Illinois Commission comments at 79-80; Pennsylvania Commission comments at 40; Ohio Consumers' Counsel reply at 24.

encouraged by the Commission but not mandated.[2587] NYNEX claims that, although the statute does not require symmetrical rates, parties may agree to such a scheme in a negotiated agreement.[2588]

1078. Certain commenters argue that any symmetry requirement should only apply to separate rate elements. The Ohio Commission supports symmetrical rates on a rate element-by-rate element basis (*e.g.*, local switching rate element, local transport rate element).[2589] For example, the Ohio Commission would not endorse symmetrical rates for transport and termination where a new entrant requests interconnection with an incumbent LEC's tandem office, and the new entrant does not have tandem capabilities.[2590] In that case, terminating a call on the new entrant's network typically would involve only the use of local switching and local transport between the interconnection point and the LEC's switch. In contrast, terminating a call on the incumbent LEC's network often is likely to involve the use of the incumbent LEC's tandem switch in addition to the local switch and the transport between the two switching offices.[2591] Bell Atlantic argues that the reciprocal compensation rate for calls delivered to an access tandem for which the terminating carrier will incur the cost of tandem switching and transport should be allowed to be higher than rates for calls delivered to an end office, which do not incur those additional costs.[2592]

1079. MFS opposes a two-tier termination rate structure under which one rate applies for traffic routed through an incumbent LEC's tandem switch, and a lower rate applies to traffic directly trunked to an incumbent LEC's end office. MFS asserts that these rate structures are inherently non-reciprocal because non-incumbent LECs typically do not operate separate tandem and end-office hierarchies.[2593] Time Warner argues that transport and termination based on incumbent LECs' historical choices of network architecture penalizes new LECs that deploy different architectures, even when that architecture is more efficient.[2594] TCI argues that higher charges for routing calls through tandem switches rather than directly through the incumbent LEC's end offices will discourage carriers from routing traffic through tandem switches, even

[2587] California Commission comments at 44.

[2588] NYNEX reply at 43-44.

[2589] Ohio Commission comments at 73-75

[2590] *Id.* at 73-74.

[2591] *Id.*

[2592] Bell Atlantic comments at 43.

[2593] MFS comments at 77-78; *see also* NCTA reply at 14-15.

[2594] Time Warner comments at 87-88; *see also* Continental comments at 13-14; Winstar comments at 26.

when it is efficient to do so.[2595]

1080. *LEC-CMRS Interconnection NPRM.* Many CMRS providers contend that they are unable to negotiate interconnection arrangements based on mutual or reciprocal compensation because of incumbent LEC bargaining power.[2596] In its reply comments, Omnipoint asserts that many interconnection agreements across the CMRS industry reflect a general incumbent LEC unwillingness to provide reciprocal compensation.[2597] SBC argues, however, that CMRS providers have significant bargaining power and numerous options for interconnection.[2598] Ameritech states that it continues to fulfill the principles of mutual compensation in all of its CMRS compensation arrangements.[2599]

1081. Although the incumbent LECs generally contend that good faith negotiations are working well,[2600] most CMRS providers comment that the negotiation process works poorly.[2601] According to AT&T, the problem of achieving mutual compensation is further compounded because incumbent LECs not only charge rates that bear no relationship to their costs but also refuse to compensate CMRS providers for termination of landline-originated calls.[2602] In many instances, incumbent LECs even charge CMRS providers for terminating incumbent LEC-originated calls.[2603] GTE, however, states that it does not charge CMRS providers for land-to-

---

[2595] TCI comments at 28.

[2596] *See, e.g.*, Nextel comments in CC Docket No. 95-185 at 5; Tracer reply in CC Docket No. 95-185 at 8; Vanguard comments in CC Docket No. 95-185 at 6; *see also* CTIA comments in CC Docket No. 95-185 at 8.

[2597] Omnipoint reply in CC Docket No. 95-185 at 3-7; *see also* RCC comments in CC Docket No. 95-185 at 5; 360 Degrees comments in CC Docket No. 95-185 at 3; Western Wireless comments in CC Docket No. 95-185 at 13.

[2598] SBC comments in CC Docket No. 95-185 at 13.

[2599] Ameritech comments in CC Docket No. 95-185 at 4.

[2600] *See, e.g.*, GTE comments in CC Docket No. 95-185 at 18; Ameritech comments in CC Docket No. 95-185 at 4.

[2601] *See, e.g.*, APC/Sprint Joint comments in CC Docket No. 95-185 at 11; PCIA reply in CC Docket No. 95-185 at 6-8; *see also* Cox comments in CC Docket No. 95-185 at 12-16; AT&T reply in CC Docket No. 95-185 at 4-8.

[2602] AT&T comments in CC Docket No. 95-185 at 8; *see also* Western Wireless comments in CC Docket No. 95-185 at 13; New Par comments in CC Docket No. 95-185 at 5.

[2603] *See, e.g.*, Arch comments in CC Docket No. 95-185 at 3; Centennial comments in CC Docket No. 95-185 at 9; Century comments in CC Docket No. 95-185 at 4; CMT comments in CC Docket No. 95-185 at 4; Nextel comments in CC Docket No. 95-185 at 5.

mobile traffic.[2604] California has rejected the principle of mutual compensation for interconnection, reasoning that such a policy would lead to a calling-party-pays system, which in turn could lead to an increase in the cost of basic telephone service.[2605] CMRS providers report that they receive mutual compensation from only a handful of the incumbent LECs with which they interconnect.[2606]

1082. CMRS providers generally agree that many interconnection arrangements result in unjust, unreasonable and discriminatory interconnection rates, terms and conditions.[2607] According to Cox, the average incremental cost of call termination, expressed on a per minute basis is .20 cents, but the average charge for cellular interconnection is currently 3 cents per minute.[2608] Similarly, Comcast states that the aggregate charge it pays Bell Atlantic for call termination is 2.5 cents per minute, or 12.5 times the average incremental cost of 0.2 cents.[2609] In contrast, the incumbent LECs assert that incumbent LEC interconnection rates have provided for reasonable charges.[2610] A few incumbent LECs also point to the lack of interconnection rate complaints filed in their respective regions as evidence of reasonable rates.[2611] Cox responds that "the fact that few complaints have been filed does not lead to the conclusion that existing agreements are reasonable, let alone that they promote competition."[2612] U S West contends that, until the local rate subsidy issue is addressed, reform in CMRS interconnection charges will not come to fruition.[2613]

[2604] GTE comments in CC Docket No. 95-185 at 19-20.

[2605] California Commission comments in CC Docket No. 95-185 at 6.

[2606] *See, e.g.*, Bell Atlantic/NYNEX Mobile comments in CC Docket No. 95-185 at 4-5.

[2607] *See, e.g.*, Comcast comments in CC Docket No. 95-185 at 4; Vanguard comments in CC Docket No. 95-185 at 7.

[2608] Cox comments in CC Docket No. 95-185 at 13.

[2609] Comcast comments in CC Docket No. 95-185 at 5-6.

[2610] *See, e.g.*, Pacific Bell reply in CC Docket No. 95-185 at 16-27; U S West comments in Docket 95-185 at 6-8.

[2611] *See, e.g.*, Bell Atlantic comments in CC Docket No. 95-185 at 9-11; NYNEX comments in CC Docket No. 95-185 at 13-15, 22-23; Ameritech comments in CC Docket No. 95-185 at 4; USTA comments in CC Docket No. 95-185 at 7.

[2612] Cox reply in CC Docket No. 95-185 at 6; *see also* New Par reply in CC Docket No. 95-185 at 7; PageNet reply CC Docket No. 95-185 at 5-7.

[2613] US West reply in CC Docket No. 95-185 at 5. US West alleges that access and local interconnection must be priced above cost to provide a subsidy to local residential services that remain priced below cost.

1083. The incumbent LECs further assert that, aside from anecdotal commentary, CMRS providers submit no evidence that their market entry or growth has been impeded by state or incumbent LEC action with respect to interconnection.[2614] The incumbent LECs argue that CMRS is developing rapidly under existing compensation arrangements and therefore current interconnection policies apparently do not pose a barrier to CMRS competition.[2615] U S West contends that CMRS providers have benefitted from negotiations that have resulted in declining interconnection charges as well as added flexibility with the introduction of calling-party-pays and wide area calling options.[2616] Many CMRS providers contend, however, that the industry may have grown faster had it not been impeded by unreasonable interconnection rates.[2617] Some incumbent LECs also point out that interconnection charges only represent a small percentage of a CMRS provider's total operating costs.[2618] But according to Airtouch, interconnection charges represent a growing proportion of CMRS costs.[2619]

1084. According to most paging companies, incumbent LEC abuses are especially acute for narrowband CMRS providers.[2620] Because virtually 100 percent of paging calls are originated on incumbent LEC networks and terminated on CMRS networks, incumbent LEC abuses, it is argued, present a formidable barrier to entry in the CMRS marketplace.[2621] Most paging carriers allege that incumbent LECs charge narrowband CMRS providers for terminating LEC-originated calls on the paging network but do not compensate narrowband CMRS providers for terminating incumbent LEC originated traffic.[2622] Many narrowband CMRS providers also allege discrimination because the charges assessed to paging companies for connection to the landline network are different from the charges assessed on other CMRS providers, and that many of these

---

[2614] *See, e.g.*, NYNEX reply in CC Docket No. 95-185 at 4; Pacific Bell reply in CC Docket No. 95-185 at 13-16.

[2615] *See, e.g.*, USTA reply in CC Docket No. 95-185 at 2-5.

[2616] US West comments in CC Docket No. 95-185 at 7-12.

[2617] *See, e.g.*, Vanguard reply in CC Docket No. 95-185 at 9; PageNet reply in CC Docket No. 95-185 at 7.

[2618] US West CC Docket No. 95-185 comments at 16; USTA reply in CC Docket No. 95-185 at 4-5. SBC estimates that interconnection charges represent 5.5 to 7 percent of a CMRS provider's total operating costs. SBC reply in CC Docket No. 95-185 at 18.

[2619] *See, e.g.*, Airtouch reply in CC Docket No. 95-185 at 10-13.

[2620] *See, e.g.*, Airtouch comments in CC Docket No. 95-185 at 59.

[2621] *See* Celpage comment in CC Docket No. 95-185 at 6.

[2622] *See e.g.*, Arch comments in CC Docket No. 95-185 at 6; Celpage comments in CC Docket No. 95-185 at 6.

interconnection charges are not substantiated with adequate cost data.[2623]

c. Discussion

(1) Symmetry In General

1085. Regardless of whether the incumbent LEC's transport and termination prices are set using a TELRIC-based economic cost study or a default proxy, we conclude that it is reasonable to adopt the incumbent LEC's transport and termination prices as a presumptive proxy for other telecommunications carriers' additional costs of transport and termination. Both the incumbent LEC and the interconnecting carriers usually will be providing service in the same geographic area, so the forward-looking economic costs should be similar in most cases. We also conclude that using the incumbent LEC's forward-looking costs for transport and termination of traffic as a proxy for the costs incurred by interconnecting carriers satisfies the requirement of section 252(d)(2) that costs be determined "on the basis of a reasonable approximation of the additional costs of terminating such calls." Using the incumbent LEC's cost studies as proxies for reciprocal compensation is consistent with section 252(d)(2)(B)(ii), which prohibits "establishing with particularity the additional costs of transporting or terminating calls."[2624] If both parties are incumbent LECs (*e.g.*, an independent LEC and an adjacent BOC), we conclude that the larger LEC's forward-looking costs should be used to establish the symmetrical rate for transport and termination. We conclude that larger LECs are generally in a better position to conduct a forward-looking economic cost study than smaller carriers.

1086. We conclude that imposing symmetrical rates based on the incumbent LEC's additional forward-looking costs will not substantially reduce carriers' incentives to minimize those costs. A symmetric compensation rule gives the competing carriers correct incentives to minimize its own costs of termination because its termination revenues do not vary directly with changes in its own costs. Moreover, symmetrical rates based on the incumbent LEC's costs should not seriously affect incumbent LECs' incentives to control costs. We expect that incumbent LECs will transport and terminate much more traffic that originates on their own networks than traffic that originates on competing carriers' networks. Even if, under the additional cost standard, incumbent LECs were required to reflect any improvements in operating efficiency, and consequent cost reductions, in reduced termination rates, the cost savings realized by the incumbent LEC are likely to be much greater than its reduction in net termination revenues, because the majority of traffic transported and terminated is likely to be its own. Even if a pass-through of incumbent LEC's cost reductions were instantaneous and complete, the number of minutes of use on which an incumbent LEC's net termination revenues is assessed is much smaller than its overall number of minutes of switching and transport. Moreover, if a

---

[2623] *See, e.g.*, Arch comments in CC Docket No. 95-185 at 23-25.

[2624] 47 U.S.C. §252(d)(2)(B)(ii).

portion of the reduction in costs is specific to exchange traffic, under symmetrical rates, the LEC's revenues from terminating traffic originating from another local carrier are based on the net difference in traffic, which is likely to be much smaller than the total traffic it terminates.[2625] For example, in the case where traffic is balanced, net termination charges are zero, a figure that is unaffected by changes in the incumbent LEC's costs, and the incumbent LEC is provided with correct incentives to minimize termination costs.

1087. We also find that symmetrical rates may reduce an incumbent LEC's ability to use its bargaining strength to negotiate excessively high termination charges that competitors would pay the incumbent LEC and excessively low termination rates that the incumbent LEC would pay interconnecting carriers. As discussed by commenters in the *LEC-CMRS Interconnection* proceeding, LECs have used their unequal bargaining position to impose asymmetrical rates for CMRS providers and, in some instances, have charged CMRS providers origination as well as termination charges.[2626] On the other hand, symmetrical rates largely eliminate such advantages because they require incumbent LECs, as well as competing carriers, to pay the same rate for reciprocal compensation.

1088. Symmetrical compensation rates are also administratively easier to derive and manage than asymmetrical rates based on the costs of each of the respective carriers. In addition, we believe that using the incumbent LEC's cost studies to establish the presumptive symmetrical rates will establish reasonable opportunities for local competition, including opportunities for small telecommunications companies entering the local exchange market.[2627] We have considered the economic impact of our rules in this section on small incumbent LECs. For example, RTC argues that symmetrical rates do not consider the costs involved in the use of another carrier's network. We find, however, that incumbent LECs' costs, including small incumbent LECs' costs, serve as reasonable proxies for other carriers' costs of transport and termination for the purpose of reciprocal compensation. We also note that certain small incumbent LECs are not subject to our rules under section 251(f)(1) of the 1996 Act, unless otherwise determined by a state

---

[2625] Consider a situation approximating traditional LEC-CMRS interconnection, in which traffic flows are substantially unbalanced: let us suppose, of 1,000,000 minutes of use, 750,000 are CMRS-to-LEC and 250,000 LEC-to-CMRS. Thus, under symmetric compensation at 0.3 cents per minute, the LEC receives 0.3 cents times 500,000, or $1,500.00. If it reduced its per-minute cost, for some reason only on terminating CMRS-to-LEC traffic, to 0.2 cents per minute, it would save 0.1 cent times 750,000, or $750.00, in reduced costs, whereas its terminating revenues would fall by only 0.1 cent times 500,000, or $500.00. Thus, it would still have substantial incentive to make the cost reduction in question. In situations closer to traffic balance, the incentive is even more favorable. And, of course, the LEC probably also reduces its cost of switching on many millions of other minutes that do not involve other networks at the same time.

[2626] *See, e.g.*, Century Comments in CC Docket No. 95-184 at 4; Western Wireless Comments in CC Docket No. 95-185 at 14.

[2627] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

commission, and certain other small incumbent LECs may seek relief from their state commissions from our rules under section 251(f)(2) of the 1996 Act. In addition, symmetry will avoid the need for small businesses to conduct forward-looking economic cost studies in order for the states to arbitrate reciprocal compensation disputes.[2628]

1089. Given the advantages of symmetrical rates, we direct states to establish presumptive symmetrical rates based on the incumbent LEC's costs for transport and termination of traffic when arbitrating disputes under section 252(d)(2) and in reviewing BOC statements of generally available terms and conditions. If a competing local service provider believes that its cost will be greater than that of the incumbent LEC for transport and termination, then it must submit a forward-looking economic cost study to rebut this presumptive symmetrical rate. In that case, we direct state commissions, when arbitrating interconnection arrangements, to depart from symmetrical rates only if they find that the costs of efficiently configured and operated systems are not symmetrical and justify a different compensation rate. In doing so, however, state commissions must give full and fair effect to the economic costing methodology we set forth in this order, and create a factual record, including the cost study, sufficient for purposes of review after notice and opportunity for the affected parties to participate. In the absence of such a cost study justifying a departure from the presumption of symmetrical compensation, reciprocal compensation for the transport and termination of traffic shall be based on the incumbent local exchange carrier's cost studies.

1090. We find that the "additional costs" incurred by a LEC when transporting and terminating a call that originated on a competing carrier's network are likely to vary depending on whether tandem switching is involved. We, therefore, conclude that states may establish transport and termination rates in the arbitration process that vary according to whether the traffic is routed through a tandem switch or directly to the end-office switch. In such event, states shall also consider whether new technologies (*e.g.*, fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC's tandem switch and thus, whether some or all calls terminating on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch. Where the interconnecting carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the interconnecting carrier's additional costs is the LEC tandem interconnection rate.

1091. We disagree with TCI's claim that higher charges for routing calls through tandem switches rather than directly through incumbent LECs' end offices will materially discourage carriers from routing traffic through tandem switches, even when it is efficient to do so. New entrants will only be encouraged to interconnect at end-office switches, rather than tandem switches, when the decrease in incumbent LEC transport charges justifies the extra costs incurred by the new entrant to route traffic directly through the incumbent LEC's end-office switches.

[2628] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

Carriers will interconnect in a way that minimizes their costs of interconnection, including the use of cost-based LEC network elements. In addition, the flexibility given to states may allow carriers, including small entities, with different network architectures to establish rates for terminating calls originating on other carriers' networks that are asymmetrical, if they can show that the costs of efficiently configured and operated systems are not symmetrical and justify different compensation rates, instead of being based on competitors' network architectures.[2629]

1092. We believe, with respect to interconnection between LECs and paging providers, that there should be an exception to our rule that states must establish presumptive symmetrical rates based on the incumbent LEC's costs for transport and termination of traffic. While paging providers, as telecommunications carriers, are entitled to mutual compensation for the transport and termination of local traffic, and should not be required to pay charges for traffic that originates on other carriers' networks, we believe that incumbent LECs' forward-looking costs may not be reasonable proxies for the costs of paging providers. Paging is typically a significantly different service than wireline or wireless voice service and uses different types and amounts of equipment and facilities. PageNet's own network, for example, is based on a regional hub and spoke network that transmits paging calls from radio transmitters to provide regional or national coverage.[2630] This configuration is distinctly different from either LEC wireline networks, with their hierarchy of switches and transmission facilities, or cellular carriers, with their multiple cells and sophisticated systems for handing off calls as a vehicle moves across cell boundaries. In addition, most calls terminated by paging companies are brief (averaging 15 seconds) in duration and contain no voice message, but only an alpha-numeric message of a few characters.[2631] Using incumbent LEC's costs for termination of traffic as a proxy for paging providers' costs, when the LECs' costs are likely higher than paging providers' cost, might create uneconomic incentives for paging providers to generate traffic simply in order to receive termination compensation. Thus, using LEC costs for termination of voice calls thus may not be a reasonable proxy for paging costs as the types of switching and transport that paging carriers perform are different from those of LECs and other voice carriers.

1093. Given the lack of information in the record concerning paging providers' costs to terminate local traffic, we have decided to initiate a further proceeding to try to determine what an appropriate proxy for paging costs would be and, if necessary, to set a specific paging default proxy. In the interim, however, in the event that LECs and paging companies cannot negotiate agreed-upon rates, we direct states, when arbitrating disputes under section 252(d)(2), to establish rates for the termination of traffic by paging providers based on the forward-looking economic

---

[2629] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

[2630] PageNet comments in CC Docket No. 95-185 at 34.

[2631] Letter from Carl W. Northrop, Paul, Hastings, Janofsy & Walker, on behalf of Arch Communications to Michele Farquhar, Chief, WTB, July 11, 1996.

costs of such termination to the paging provider. The paging provider seeking termination fees must prove to the state commission the costs of terminating local calls. Given the lack of information in the record concerning paging providers' costs, we further conclude that the default price for termination of traffic from the end office that we adopt in this proceeding in Section XI.A.3., *supra*, does not apply to termination of traffic by paging providers. This default price is based on estimates in the record of the costs to LECs of termination from the end office or end-office switching. There are no such estimates with respect to paging in the record, and as discussed above, we find that estimates of LEC costs may not reflect paging providers' costs.

(2) Existing Non-Reciprocal Agreements Between Incumbent LECs and CMRS Providers

1094. Section 20.11 of our rules, which predates enactment of the 1996 Act, requires that interconnection agreements between incumbent LECs and CMRS providers comply with principles of mutual compensation, and that each carrier pay reasonable compensation for transport and termination of the other carrier's calls.[2632] Based on the extensive record in the *LEC-CMRS Interconnection* proceeding, as well as that in this proceeding, we conclude that, in many cases, incumbent LECs appear to have imposed arrangements that provide little or no compensation for calls terminated on wireless networks, and in some cases imposed charges for traffic originated on CMRS providers' networks, both in violation of section 20.11 of our rules.[2633] Accordingly, we conclude that CMRS providers that are party to pre-existing agreements with incumbent LECs that provide for non-mutual compensation have the option to renegotiate these agreements with no termination liabilities or other contract penalties. Pending the successful completion of negotiations or arbitration, symmetrical reciprocal compensation provisions shall apply, with the transport and termination rate that the incumbent LEC charges the CMRS provider from the pre-existing agreement applying to both carriers, as of the effective date of the rules we adopt pursuant to this order.

1095. In addition, we conclude that this opportunity for CMRS providers currently operating under arrangements with non-mutual transport and termination rates to renegotiate such arrangements advances the mutual compensation regime contemplated under section 251(b)(5) of

---

[2632] 47 C.F.R. § 20.11.

[2633] *See, e.g.*, Centennial comments in Docket 95-185 at 8-9 (states that it does not receive compensation for terminating LEC-originated traffic in any of its 28 cellular markets, and is charged by the LEC to terminate LEC-originated calls in many of those markets); Century Cellunet comments in Docket 95-185 (states that it does not receive compensation from LECs to terminate landline originating calls, and that in some states, it must pay the LEC to terminate landline originating calls; further states that it is charged an average rate of $0.025 per minute for local interconnection); Point Communications comments in Docket 95-185 at 1 (Point has never received compensation for terminating landline originated calls); and Vanguard Cellular comments in Docket 95-185 at 7–8; 11 (notes that of the 95 LECs with which it interconnects, only one LEC in one community pays compensation for termination of LEC-originated calls).

the 1996 Act.[2634] We find that extending the opportunity to establish symmetrical reciprocal compensation for the transport and termination of traffic addresses inequalities in bargaining power that incumbent LECs may used to disadvantage interconnecting wireless carriers. At the same time, our rule will place wireless carriers with non-mutual, existing agreements on the same footing as other new entrants, who will be able to negotiate more equitable interconnection agreements because of the rules we put in place with this Report and Order. We find that we have ample authority under section 4(i) of the 1934 Act as well as section 251 of the 1996 Act, to order this remedy. Courts have held that "the Commission has the power to prescribe a change in contract rates when it finds them to be unlawful . . . and to modify other provisions of private contracts when necessary to serve the public interest."[2635] The opportunity that we are affording to CMRS providers in this context is consistent with similar "fresh look" requirements that we have adopted in the past.[2636]

5. Bill and Keep

a. Background

1096. *Local Competition NPRM.* In the NPRM, we defined bill-and-keep arrangements as those in which neither of two interconnecting networks charges the other network for terminating traffic that originated on the other network.[2637] Instead, each network recovers from its own end users the cost of both originating traffic delivered to the other network and terminating traffic received from the other network. A bill-and-keep approach for termination of traffic does not, however, preclude a positive flat-rated charge for transport of traffic between carriers' networks.

[2634] We use the term "reciprocal compensation" and "mutual compensation" synonymously to mean that compensation flows in both directions between interconnecting networks. *See LEC-CMRS Interconnection NPRM* at para. 27 n.31.

[2635] *Western Union Tel. Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987). The Commission has adopted similar "fresh look" requirements in the past.

[2636] *See, e.g., Expanded Interconnection with Local Telephone Company Facilities*, CC Docket Nos. 91-141 and 92-222, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369, 7463-7465 (1992), *recon.*, 8 FCC Rcd 7341, 7342-7359 (1993) (fresh look to enable customers to take advantage of new competitive opportunities under special access expanded interconnection), *vacated on other grounds and remanded for further proceedings sub nom. Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441 (1994); *Competition in the Interstate Interexchange Marketplace*, CC Docket No. 90-132, Memorandum Opinion and Order on Reconsideration, 7 FCC Rcd 2677, 2681-82 (1992) ("fresh look" in context of 800 bundling with interexchange offerings); *Amendment of the Commission's Rules Relative to Allocation of the 849-851/894-896 MHz Bands*, GEN Docket No. 88-96, Memorandum Opinion and Order on Reconsideration, 6 FCC Rcd 4582, 4583-84 (1991) ("fresh look" requirements imposed in context of air-ground radiotelephone service as condition of grant of Title III license).

[2637] NPRM at para. 239.

1097. We sought comment on what guidance we should give state commissions regarding the use of bill-and-keep arrangements in arbitrated interconnection arrangements.[2638] We sought comment on whether section 252(d)(2)(B)(ii) specifically authorizes states to impose bill-and-keep arrangements in the arbitration process, at least when certain conditions are met.[2639] We also sought comment on whether we should interpret the statute as placing any limits on the circumstances in which states may adopt bill-and-keep arrangements.[2640] We also asked for comment on the meaning of the statutory description of bill-and-keep arrangements as "arrangements that waive mutual recovery."[2641] In addition, we sought comment on whether there are any circumstances in which the statute requires states to establish bill-and-keep arrangements.[2642]

1098. *LEC-CMRS Interconnection NPRM.* In the *LEC-CMRS Interconnection NPRM*, we proposed bill and keep as an interim arrangement.[2643] We noted there that proponents have argued that bill-and-keep would be economically efficient if either of two conditions are met: (1) traffic flows between competing LECs are balanced; or (2) the per-unit cost of interconnection is *de minimis*. We, therefore, address whether interim bill-and-keep arrangements for LEC-CMRS traffic should be imposed.

b. Comments

1099. *Local Competition NPRM.* Numerous new entrants and state commissions contend that bill-and-keep arrangements are expressly authorized by the statute.[2644] Non-incumbent LECs argue that section 252(d)(2) makes clear that bill-and-keep satisfies the reciprocal compensation duties of section 251(b)(5). Therefore, pursuant to the Commission's broad authority to adopt implementing regulations via section 251(d)(1), and consistent with the interconnection pricing standards, they argue that the Commission has the authority to require a bill-and-keep reciprocal

[2638] NPRM at para. 243.

[2639] *Id.*

[2640] *Id.*

[2641] *Id.* (*citing* 47 U.S.C. § 252(d)(2)(B)(i)).

[2642] *Id.*

[2643] *See LEC-CMRS Interconnection NPRM* at paras. 60-62.

[2644] *See, e.g.*, Continental comments at 11; GST comments at 34-35; California Commission comments at 45-46; Time Warner comments at 93, reply at 34-37; Omnipoint comments at 15; Hyperion comments at 20-21; WinStar reply at 12.

compensation mechanism.[2645] Continental and NCTA assert, contrary to some incumbent LEC arguments, that section 252(b)(2)(B)(i) does not limit bill-and-keep to situations in which incumbent LECs waive their right to some other form of compensation, but instead clarifies that regulators are not precluded from imposing or approving such waivers.[2646] Numerous state commissions contend that reciprocal compensation issues should be left to the states to decide, and that states have the authority to impose bill-and-keep arrangements.[2647] Many of these commenters further argue that, while states have the authority to require bill-and-keep arrangements, the Commission does not have the authority to mandate these arrangements.[2648]

1100. Incumbent LECs as well as certain other commenters contend that mandatory bill-and-keep requirements conflict with the 1996 Act.[2649] Numerous incumbent LECs also argue that bill-and-keep arrangements fail the "reasonable approximation of the additional costs" test of section 252(d)(2) because they would effectively price termination at zero.[2650] For example, RTC argues that bill and keep fails to adequately deal with each carrier's costs and should not be considered, even as an interim proposal.[2651] Cincinnati Bell contends that the statute merely authorizes bill-and-keep arrangements in voluntary negotiations and only parties to the negotiation can properly assess if such an arrangement would be appropriate.[2652] In response to Cincinnati Bell's argument, potential new entrants counter that the only reasonable interpretation of section 252(d)(2) is that regulators may impose bill and keep over the objection of an incumbent LEC.[2653] They assert that this is the only logical interpretation because section 252(d)(2) only applies to

---

[2645] *See, e.g.*, Time Warner comments at 93-94; ACSI comments at 21-26. *But see* Ohio Consumers' Counsel reply at 24 (contending that Time Warner's argument is circular).

[2646] Continental comments at 11 n.15; NCTA comments at 55; *cf.* Cox reply at 19.

[2647] *See, e.g.*, Louisiana Commission comments at 20; Illinois Commission comments at 80; District of Columbia Commission comments at 37-38; Florida Commission comments at 40; *see also* Ohio Consumers' Counsel reply at 24.

[2648] *See, e.g.*, Illinois Commission comments at 80; District of Columbia Commission comments at 38.

[2649] *See, e.g.*, Ameritech comments at 78-79; PacTel comments at 95; SBC comments at 51-52; GTE comments at 56-58; BellSouth comments at 73-74; Cincinnati Bell comments at 38-39; Frontier comments at 32; Washington Independent Tel. Ass'n comments at 4; TDS comments at 24; ALTS comments at 45.

[2650] *See, e.g.*, NYNEX comments at 88-90; Ameritech Comments at 78-79; Bell Atlantic comments at 41-42; PacTel comments at 95; USTA comments at 82-84; U S West comments at 70-71.

[2651] RTC comments at 23.

[2652] Cincinnati Bell comments at 38-39.

[2653] *See, e.g.*, Jones Intercable comments at 27; NCTA reply at 15; ALTS reply at 31 n.37; Comcast reply at 12-14.

arbitration cases. If parties reach an agreement to use bill-and-keep arrangements, this section would not apply.[2654]

1101. Proponents of bill-and-keep arrangements contend that these arrangements minimize the administrative costs associated with metering and billing that would be incurred under other compensation methods.[2655] In addition, because there currently may be no mechanism readily available to new entrants for measuring terminating traffic, states and new entrants argue that the cost of measurement and billing under a reciprocal compensation agreement is not known.[2656] TCG asserts that bill-and-keep arrangements would reduce small carriers burdens by eliminating billing and monitoring requirements and the potential for carrier disputes.[2657] MCI asserts that termination measurement and billing costs would represent a substantial portion of termination costs.[2658] It notes that in the state of Washington, US West estimated that measurement and billing costs would more than double its reported TSLRIC cost of switching for local terminations.[2659] Other benefits of a bill-and-keep arrangement presented by commenters include: (1) elimination of incentives to "game" the LEC-to-LEC relationship by soliciting (or avoiding) customers with high incoming or outgoing usage;[2660] (2) architectural and technological neutrality;[2661] (3) the reduction of economic barriers to entry because it does not require additional capital investment that other arrangements would necessitate;[2662] and (4) economic efficiency.[2663] USTA, however, asserts that alternative local service providers will have no economic incentives

---

[2654] *Id.*

[2655] *See, e.g.*, California commission at 45; DOJ comments at 34-35; Teleport comments at 77; Jones Intercable comments at 28-29; Mass. Attorney General comments at 19. *But see* Bell Atlantic reply at Exhibit 2, p.8 (Richard Epstein, a witness for Bell Atlantic, argues that bill-and-keep may lead to habitual overconsumption by the party terminating less traffic that will be significantly more costly than administrative cost savings).

[2656] *See, e.g.*, Colorado Commission comments at 59; AT&T comments at 69; Sprint comments at 86-87; ACSI comments at 22-23.

[2657] TCG comments at 80.

[2658] MCI comments at 48.

[2659] *Id.; see also* Teleport comments at 77.

[2660] *See, e.g.*, Jones Intercable comments at 27-28; GST comments at 34-35; MCI comments at 53.

[2661] *See* Mass. Attorney General comments at 19.

[2662] *See, e.g.*, Telecommunications Resellers Ass'n comments at 54.

[2663] *See, e.g.*, Jones Intercable comments at 28; ACSI comments at 21-26; Competitive Policy Institute reply at 15-17.

to use the lower cost facilities or service under bill-and-keep arrangements.[2664]

1102. Potential new entrants observe that bill-and-keep arrangements have traditionally been used by neighboring incumbent LECs for exchanging traffic. Thus, they argue, bill-and-keep arrangements represent a fair mechanism for the exchange of traffic between new entrants and incumbent LECs.[2665] In response to this argument, MECA counters that compensation arrangements should not be patterned after EAS interconnections between incumbent LECs because those EAS arrangements were not designed for the competitive environment.[2666]

1103. Numerous commenters address the issue of the likely balance of traffic between a new entrant and an incumbent LEC. New entrants argue that in most cases traffic between incumbent LECs and competing LECs will be relatively balanced over time[2667] and that additional costs to terminate traffic on already over-built incumbent LEC networks are close to zero.[2668] In addition, the Consumer Federation of America contends that once barriers to competition (*e.g.*, number portability) are removed there is no reason to believe that there will be substantial incentives to seek heavy outgoing-only customers.[2669] While acknowledging that bill-and-keep arrangements may be problematic if traffic levels exchanged are significantly different, other new entrants argue that critics have failed to produce any evidence of materially uneven traffic loadings.[2670] MECA, however, argues that a bill-and-keep reciprocal compensation mechanism is flawed because it is premised on the assumption that terminating traffic will be equal in both directions for competing LECs.[2671] MECA argues that this assumption is incorrect because new entrants will engage in niche marketing to get a toehold in a new service area, and therefore the size of each carrier's customer base will be different and the total number of originating minutes

---

[2664] USTA comments at Attachment (Affidavit of Jerry A. Hausman), p. 9-10; *see also* BellSouth comments at Attachment (Interconnection and Economic Efficiency), p. 8-10; Bell Atlantic reply at Attachment (Declaration of Richard A. Epstein) p. 8 (adopting bill and keep would invite new entrants, that are able to tailor their networks, to keep traffic perpetually out of balance, as, for example, by actively courting companies, such as telephone solicitors, that generate a huge volume of outgoing calls).

[2665] *See, e.g.*, Sprint/APC comments at 11-12; TCI comments at 27; Continental comments at 10.

[2666] MECA comments at 69.

[2667] Time Warner comments at 97-98; *see also* TCI comments at 35-37.

[2668] Time Warner comments at 98-99; *see also* Teleport comments at 81-83.

[2669] CFA/CU comments at 55.

[2670] *See, e.g.*, ACSI comments at 24; GST comments at 34-35.

[2671] MECA comments at 68-69.

will differ.[2672]

1104. Numerous new entrants and state commissions recommend that bill-and-keep arrangements be implemented on an interim basis[2673] and note that reciprocal compensation arrangements will not be practical until mechanisms are developed to measure the relevant traffic volumes.[2674] Ameritech, however, argues that parties advocating mandating bill-and-keep arrangements on an interim basis do not take into account that the period during which the new carriers first enter a local market will be the time during which traffic is most unbalanced between the new entrants and the incumbent LEC.[2675] BellSouth argues that characterizing bill and keep as an interim arrangement does not remedy the problems associated with bill and keep.[2676]

1105. Some commenters opposed to bill-and-keep arrangements also argue that mandating these arrangements violates the takings clause of the Fifth Amendment.[2677] Numerous incumbent LECs argue that mandating bill-and-keep arrangements requires a LEC to transport and terminate traffic of another LEC, constituting a physical intrusion into the LEC's property.[2678] BellSouth further asserts that bill and keep would lead to no compensation for use of incumbent LEC property and will therefore constitute an uncompensated taking in violation of the Constitution.[2679] AT&T responds that there is no basis for the argument that bill and keep would be a taking.[2680] AT&T asserts that these claims are speculative and rest on an erroneous premise that bill-and-

---

[2672] MECA comments at 68-69; *but see* GST comments at 34-35 (using compensation systems other than bill-and-keep would encourage new entrants to focus entry strategies on niches that exploit compensation levels).

[2673] *See, e.g.*, Alabama Commission comments at 32; GST comments at 34-35; AT&T comment at 69; Cox comments at 27-28, 38-39; Sprint comments at 87; Jones Intercable comments at 28-29; Mass. Attorney General comments at 14, 21; Telecommunication Resellers Ass'n comments at 54-55.

[2674] *See, e.g.*, AT&T comments at 69; Colorado Commission at 59.

[2675] Ameritech reply at 36.

[2676] BellSouth reply at 40.

[2677] *See, e.g.*, Bell Atlantic comments at 41-42; Cincinnati Bell comments at 39 n.71; USTA comments at 84; U S West comments at 70-71; GTE comments at 57-58; BellSouth comments at 74-75.

[2678] *See, e.g.*, BellSouth comments at 74-75; Bell Atlantic comments at 41.

[2679] BellSouth comments at 74-75.

[2680] AT&T reply at 36; *see also* ALTS reply at 31; Cox reply at 21-22; Comcast reply at 14; Teleport reply at 20-22.

keep would provide no (or inadequate) compensation.[2681] AT&T argues that, as Congress recognizes, bill and keep allows each carrier in-kind compensation in the form of access to the other carrier's network.[2682] Similarly, Ohio Consumers' Counsel argues that a bill-and-keep mechanism makes each company whole through its own rate design and structure. As such, Ohio Consumers' Counsel argues that allegations that bill and keep means that a competing carrier gets to use the incumbent LEC's network for free cannot withstand scrutiny.[2683] NCTA asserts that bill and keep is not "physical occupation" of the incumbent LEC property, and furthermore does not authorize an invasion of incumbent LEC property, any more than it authorizes incumbent LECs to invade a new entrant's property.[2684] In response to the confiscation argument, NCTA contends that rate regulation does not violate the takings clause unless it is so "unjust as to destroy the value of the property for all purposes for which it was acquired."[2685]

1106. Some wireless commenters argue that bill-and-keep arrangements are not appropriate for incumbent LEC-narrowband CMRS or incumbent LEC-paging reciprocal compensation.[2686] ProNet argues that, because paging carriers' incremental termination costs are above zero and there is no evidence that paging demand is inelastic, imposing bill and keep would likely result in serious resource misallocation.[2687] In addition, PageNet argues that, with respect to paging, the cost of termination is not small and in fact comprises a significant portion of the total revenue requirement for paging services.[2688] With respect to rural incumbent LECs, Bay Spring argues that states should be prohibited from adopting bill-and-keep arrangements to the extent that they force rural incumbent LECs to terminate other carriers' calls on their rural networks without compensation.[2689]

[2681] *Id.*

[2682] AT&T reply at 36; *see also* Washington Commission comments at 3, 38; Teleport comments at 68.

[2683] Ohio Consumers' Counsel comments at 44.

[2684] NCTA reply at 16; *see also* Cox reply at 21-22.

[2685] *Id.* at 17 (*citing Duquesne Light Co. v. Barasch*, 109 S.Ct. 609, 615 (1989), and *Covington & Lexington Turnpike Road Co. v. Sandford*, 164 U.S. 578, 579 (1896)).

[2686] *See, e.g.*, ProNet comments at 11; PageNet comments at 11.

[2687] ProNet comment at 11-12.

[2688] PageNet comments at 11.

[2689] Bay Springs, et. al comments at 17; *see also* GVNW comments at 41; Bay Springs et. al reply at 11-12 (incremental termination costs are higher for small LECs because the smaller size of their networks reduce economies of scale).

1107. *LEC-CMRS Interconnection NPRM.* CMRS providers, with the exception of paging providers, generally support the Commission's proposal to adopt an interim bill-and-keep compensation mechanism.[2690] Some supporters of an interim bill-and-keep compensation model argue that it should be adopted on a permanent basis,[2691] and others argue that it should be extended to transport charges.[2692] PageNet and other paging providers oppose application of a bill-and-keep compensation mechanism to the paging industry because traffic flows are entirely one-way.[2693] Sprint supports application of an interim bill-and-keep model solely for incumbent LEC-PCS interconnection.[2694]

1108. Most CMRS providers contend that bill and keep is an appropriate interim compensation mechanism because the incremental cost of incumbent LEC-CMRS interconnection is so low that there is little difference between a cost-based and zero rate.[2695] Cox and other commenters cite the Brock study's conclusions that the national average incremental cost of incumbent LEC-CMRS interconnection is 0.2 cents per minute and that the off-peak cost is close to zero as support for adoption of an interim bill-and-keep model.[2696] Cox contends that none of the incumbent LECs has submitted evidence that the average incremental cost of call termination is anything other than 0.2 cents per minute.[2697] In addition, APC notes that it has relatively balanced traffic flows with incumbent LECs[2698] and a number of CMRS providers assert that incumbent LEC-cellular traffic flows will become more balanced in the future.[2699] AT&T states

---

[2690] *See, e.g.*, AirTouch comments in CC Docket No. 95-185 at 20; CTIA comments in CC Docket No. 95-185 at 7; Comcast comments in CC Docket No. 95-185 at 9.

[2691] *See, e.g.*, New Par comments in CC Docket No. 95-185 at 10; NC 4 Cellular comments in CC Docket No. 95-185 at 1.

[2692] *See, e.g.*, MCI comments in CC Docket No. 95-185 at 5; Nextel comments in CC Docket No. 95-185 at 9; Omnipoint comments in Docket No. 95-185 at 8.

[2693] PageNet comments in CC Docket No. 95-185 at 23; *see also, e.g.*, Allied comments in CC Docket No. 95-185 at 8; Arch comments in CC Docket No. 95-185 at 11.

[2694] Sprint comments in CC Docket No. 95-185 at 7.

[2695] *See, e.g.*, Cox comments in CC Docket No. 95-185 at 29-30.

[2696] Cox comments in CC Docket No. 95-185 at 23; *see also* New Par comments in CC Docket No. 95-185 at 12.

[2697] Cox reply in CC Docket No. 95-185 at 41-42; *see also* Comcast reply in CC Docket No. 95-185 at 17-22.

[2698] APC comments in CC Docket No. 95-185 at 9.

[2699] *See, e.g.*, PCIA comments in CC Docket No. 95-185 at 8; Time Warner comments in CC Docket No. 95-185 at 21.

that any traffic imbalances are offset by the higher cost to CMRS providers of terminating incumbent LEC-originated calls.[2700] Similarly, CTIA asserts that the relevant inquiry is whether the costs each carrier incurs to terminate traffic are balanced, not whether total traffic is balanced.[2701] Some commenters argue that bill and keep is necessary to curb incumbent LEC market power and to remedy incumbent LECs' failure to provide mutual compensation.[2702]

1109. Incumbent LEC commenters, however, generally oppose the Commission's proposal to adopt an interim bill-and-keep compensation mechanism.[2703] A number of incumbent LECs contend that neither of the two conditions that justify a bill-and-keep compensation mechanism -- balanced traffic flows or interconnection costs near zero -- are present in the context of incumbent LEC-CMRS interconnection.[2704] SBC states that bill-and-keep is inappropriate where 80 percent of traffic is CMRS-to-incumbent LEC.[2705] USTA asserts that CMRS interconnection causes incumbent LECs to incur costs for which they should be compensated, and estimates that those costs are 1.3 cents ($0.013) per minute.[2706] Other incumbent LECs contend that the Brock study underestimates the costs of incumbent LEC-CMRS interconnection, but provide no cost estimates of their own.[2707] In addition, many opponents of bill-and-keep contend that it will create market distortions and encourage arbitrage.[2708] Some incumbent LEC commenters assert that incumbent LECs will be unable to recover from ratepayers the lost revenues from LEC-CMRS interconnection charges,[2709] and that bill and keep

---

[2700] AT&T comments in CC Docket No. 95-185 at 10.

[2701] CTIA reply in CC Docket No. 95-185 at 12-14.

[2702] *See, e.g.*, CTIA comments in CC Docket No. 95-185 at 9; Telecommunications Resellers Ass'n comments in CC Docket No. 95-185 at 8.

[2703] *See, e.g.*, Bell Atlantic comments in CC Docket No. 95-185 at 6; BellSouth comments in CC Docket No. 95-185 at 20; NTCA comments in CC Docket No. 95-185 at 8. *But see* Teleport comments in CC Docket No. 95-185 at 2.

[2704] *See, e.g.*, Ameritech comments in CC Docket No. 95-185 at 8-9, Cincinnati Bell comments in CC Docket No. 95-185 at 4-5.

[2705] SBC comments in CC Docket No. 95-185 at 12.

[2706] USTA comments in CC Docket No. 95-185 at 24, Attachment (Bill and Keep: A Bad Solution to a Non-Problem), p. 8.

[2707] *See, e.g.*, BellSouth comments in CC Docket No. 95-185 at 24.

[2708] *See, e.g.*, Pacific Bell comments in CC Docket No. 95-185 at 11, 60.

[2709] *See, e.g.*, BellSouth comments in CC Docket No. 95-185 at 28; NYNEX comments in CC Docket No. 95-185 at 34; U S West comments in CC Docket No. 95-185 at 25.

is an unlawful taking.[2710] U S West disputes the Commission's contention that bill-and-keep is administratively efficient because, it argues, carriers will still have to develop billing and accounting systems.[2711]

1110. Several commenters propose alternatives to the Commission's proposed bill-and-keep interim compensation mechanism. For example, Frontier suggests that the Commission adopt a benchmark compensation scheme similar to that offered by Ameritech in Illinois, which sets a rate of .5 cents ($0.005) per minute for end office termination and .75 cents ($0.0075) per minute for tandem termination.[2712] CMS recommends that bill and keep apply for a two year voluntary period, after which a mandatory negotiation period under bill and keep would be imposed if the parties fail to reach agreement.[2713] RCC proposes that bill and keep be used only until a "carrier access billing system" can be implemented.[2714]

c. Discussion

1111. As an additional option for reciprocal compensation arrangements for termination services, we conclude that state commissions may impose bill-and-keep arrangements if neither carrier has rebutted the presumption of symmetrical rates and if the volume of terminating traffic that originates on one network and terminates on another network is approximately equal to the volume of terminating traffic flowing in the opposite direction, and is expected to remain so, as defined below. We disagree with commenters who contend that the Commission and states do not have the authority to mandate bill-and-keep arrangements under any circumstances. Section 252(d)(2)(B)(i) provides that the definition of what may be considered "just and reasonable" terms and conditions for reciprocal compensation "shall not be construed to preclude arrangements that afford mutual recovery (such as bill-and-keep arrangements)."[2715] We conclude that section 252(d)(2) would be superfluous if bill-and-keep arrangements were limited to negotiated agreements, because none of the standards in section 252(d) apply to voluntarily-negotiated agreements. Therefore, it is clear that bill-and-keep arrangements may be imposed in the context of the arbitration process for termination of traffic, at least in some circumstances.

[2710] *See, e.g.*, Bell Atlantic comments in CC Docket No. 95-185 at 8; BellSouth comments in CC Docket No. 95-185 at 20; Pacific Bell comments in CC Docket No. 95-185 at 79; U S West comments in CC Docket No. 95-185 at 49.

[2711] U S West comments in CC Docket No. 95-185 at 39-40.

[2712] Frontier comments in CC Docket No. 95-185 at 9.

[2713] CMS comments in CC Docket No. 95-185 at 17.

[2714] RCC comments in CC Docket No. 95-185 at 8-9.

[2715] 47 U.S.C. § 252(d)(2)(B)(i).

1112. Section 252(d)(2)(A)(i) provides that to be just and reasonable, reciprocal compensation must "provide for the mutual and reciprocal recovery by each carrier of costs associated with transport and termination."[2716] In general, we find that carriers incur costs in terminating traffic that are not *de minimis*, and consequently, bill-and-keep arrangements that lack any provisions for compensation do not provide for recovery of costs. In addition, as long as the cost of terminating traffic is positive, bill-and-keep arrangements are not economically efficient because they distort carriers' incentives, encouraging them to overuse competing carriers' termination facilities by seeking customers that primarily originate traffic. On the other hand, when states impose symmetrical rates for the termination of traffic,[2717] payments from one carrier to the other can be expected to be offset by payments in the opposite direction when traffic from one network to the other is approximately balanced with the traffic flowing in the opposite direction. In such circumstances, bill-and-keep arrangements may minimize administrative burdens and transaction costs. We find that, in certain circumstances, the advantages of bill-and-keep arrangements outweigh the disadvantages, but no party has convincingly explained why, in such circumstances, parties themselves would not agree to bill-and-keep arrangements. We are mindful, however, that negotiations may fail for a variety of reasons. We conclude, therefore, that states may impose bill-and-keep arrangements if traffic is roughly balanced in the two directions and neither carrier has rebutted the presumption of symmetrical rates.

1113. We further conclude that states may adopt specific thresholds for determining when traffic is roughly balanced. If state commissions impose bill-and-keep arrangements, those arrangements must either include provisions that impose compensation obligations if traffic becomes significantly out of balance or permit any party to request that the state commission impose such compensation obligations based on a showing that the traffic flows are inconsistent with the threshold adopted by the state.[2718] States may, however, also apply a general presumption that traffic between carriers is balanced and is likely to remain so. In that case, a party asserting imbalanced traffic arrangements must prove to the state commission that such imbalance exists. Under such a presumption, bill-and-keep arrangements would be justified unless a carrier seeking to rebut this presumption satisfies its burden of proof. We also find that states that have adopted bill-and-keep arrangements prior to the date that this order becomes effective, either in arbitration or rulemaking proceedings, may retain such arrangements, unless a party proves to the state commission that traffic is not roughly balanced. In that case, the state commission is to determine the termination rates based either on the forward-looking economic cost-based methodology or consistent with the default proxies in this order. Finally, we observe

---

[2716] 47 U.S.C.§ 252(d)(2)(A)(i).

[2717] *See infra*, Section XI.A.4.c. for a discussion of symmetrical rates.

[2718] For example, the Michigan Commission adopted a five percent threshold for the difference between the traffic flows in the two directions. Michigan Commission comments at Attachment 1 (Michigan Public Service Commission Case No. U-10647), p.29.

that carriers have an incentive to agree to bill-and-keep arrangements if it is economically efficient to do so, and that nothing in the Act prevents parties from agreeing to bill-and-keep arrangements even if a state declines to mandate such arrangements. For example, we note that Time Warner/BellSouth interconnection agreement provides for a bill-and-keep arrangement based on a "roughly balanced traffic" concept.[2719]

1114. In determining whether traffic is balanced, we find that precise traffic measurement is not necessary. It is sufficient to use approximations based on samples and studies comparable to reports on percentages of interstate use often used for access charge billing. Such an approach is likely to reduce implementation costs and complexities. Alternatively, state commissions may require that traffic flowing in the two directions be measured as accurately as possible during some defined period of time, which may commence no later than six months after an interconnection arrangement goes into effect. All affected carriers are required to cooperate with the state commission in implementing this measurement. A state commission that adopts a traffic flow measurement approach may adopt a "true-up" mechanism to ensure that no carrier is disadvantaged by an interim rate that differs from the rate established once such a measurement is undertaken. Finally, state commissions may require that local traffic and access traffic be carried on separate trunk groups if they deem such measures to be necessary to ensure accurate measurement and billing.

1115. We have considered the economic impact of our rules in this section on small incumbent LECs. For example, RTC argues that bill-and-keep arrangements fail to adequately deal with each carrier's costs.[2720] In addition to basing reciprocal compensation on the incumbent LECs costs, we believe that by allowing carriers to rebut a presumption of balanced traffic volumes, the concern that bill-and-keep arrangements fail to adequately deal with each carrier's costs are addressed. We also note that certain small incumbent LECs are not subject to our rules under section 251(f)(1) of the 1996 Act, unless otherwise determined by a state commission, and certain other small incumbent LECs may seek relief from their state commissions from our rules under section 251(f)(2) of the 1996 Act.

1116. We disagree with commenters that argue that mandating bill-and-keep arrangements

---

[2719] Letter from W.W. Jordan, Executive Director, BellSouth, to William F. Caton, Acting Secretary, FCC, July 11, 1996. Per the agreement, no party shall owe compensation to the other unless the net minutes of use for terminating local traffic results in a dollar amount in excess of the amount designated for each month during the calculation period as follows: (1) during the first six month period of operation, no charges shall accrue, or compensation paid for the termination of local traffic, however, parties shall exchange billing information and usage data during this initial period for the purpose of reviewing for accuracy only; (2) during the second six months, $40,000 per month/billing period; (3) during the third six months, $30,000 per month/billing period; (4) during the fourth six months, $20,000 per month/billing period; and (5) during any extension of this agreement pursuant to Article II, paragraph 2.03, $0 per month/billing period.

[2720] RTC comments at 23.

in these circumstances violates the taking clause of Fifth Amendment. We reject BellSouth's argument that mandating bill-and-keep mechanisms would constitute a physical intrusion of LEC property. As NCTA observes, bill-and-keep arrangements are not a "physical occupation" of incumbent LEC property and thus *per se* takings cases[2721] are irrelevant. We also reject arguments that the bill-and-keep arrangements we adopt here would not adequately compensate incumbent LECs for transport and termination. As Congress recognized, bill-and-keep arrangements allow each carrier compensation "in-kind" in the form of access to the other carrier's network.[2722] Therefore, the type of bill-and-keep arrangements that we have permitted states to adopt are not unconstitutionally confiscatory.

1117. Commenters in the *LEC-CMRS Interconnection NPRM* assert that the estimated per minute cost of LEC termination ranges from 0.2 to 1.3 cents, and most of the estimates are clustered near the lower end of this range.[2723] These estimates are based primarily on interconnection at a LEC end office,[2724] while most interconnections occur at tandem offices where LECs' costs of call completion are higher than terminations routed directly through the end office switch.[2725] Moreover, the record contains no estimates of the cost of CMRS termination. That cost is generally considered to be greater than the cost of LEC termination;[2726] but only one oral, *ex parte* estimate of CMRS cost has been offered: 2.25 to 4.0 cents per minute.[2727] Further, there is no showing that the transaction costs of measuring traffic flows and making net payments would be so high that a bill-and-keep regime would be more efficient. Moreover, no party has demonstrated that aggregate cost flows between interconnecting LECs and CMRS providers are in balance.

[2721] *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886, 2893 (1992).

[2722] Joint Explanatory Statement at 120.

[2723] For the .2 cents per minute estimate, see letter from Robert F. Roche, CTIA, to William F. Caton, Acting Secretary, Federal Communications Commission, filed in CC Docket No. 94-54, Gerald W. Brock, *The Economics of Interconnection: Incremental Cost of Local Usage* (April 1995). For the 1.3 cents per minute estimate, *see* USTA Comments, CC Docket No. 95-185, submission of Jeffrey H. Rohlfs, Harry M. Shooshan III, and Calvin S. Monson, at 9-10.

[2724] *See supra*, Section VII.C.2.b.(2), for a complete discussion of cost estimates for terminations at both the end office and tandem office switches.

[2725] U S West comments in CC Docket No. 95-185 Attachment A (In Response to Dr. Gerald Brock by Professor Robert G. Harris), p. 11-14.

[2726] *See, e.g.*, AT&T comments in CC Docket No. 95-185 at Attachment (Declaration of Bruce M. Owen), p. 5-6.

[2727] Steven R. Brenner and Bridger M. Mitchell, CTIA *ex parte* briefing, CC Docket No. 95-185, Mar. 21, 1996.

1118. In light of the overall transport and termination policy we are adopting, we do not adopt the interim bill and keep arrangement tentatively proposed in the LEC-CMRS Interconnection NPRM. Notwithstanding our conclusions about bill and keep above, under which states may rule on bill and keep for particular pairs of firms based on the circumstances prevailing between them, we conclude that we are correct in not adopting bill and keep as a single, nationwide policy that would govern all LEC-CMRS transport and termination of traffic. Thus, we reject our tentative conclusion in the LEC-CMRS Interconnection NPRM. We expect, however, that when it is economically efficient to do so, parties will adopt bill and keep arrangements in the negotiation process. Also, as described above, a state commission may impose bill-and-keep arrangements with respect to CMRS-LEC traffic when it finds that traffic is roughly balanced and is expected to remain so.

B. ACCESS TO RIGHTS OF WAY

1. Overview

1119. Section 251(b)(4) imposes upon each LEC the "duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224."[2728] The access provisions of section 224, as amended by the 1996 Act, differ from the requirements of section 251(b)(4) with respect to both the entities required to grant access and the entities that may demand access. Section 224(f)(1) imposes upon all utilities,[2729] including LECs, the duty to "provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it."[2730] For purposes of section 224, the term "telecommunications carrier" excludes any incumbent LEC as that term is defined in section 251(h).[2731]

1120. In the NPRM, we sought comment on various aspects of this access requirement, as well as on section 224(f)(2) which creates the following limited exception to the obligations of section 224(f)(1):

> Notwithstanding paragraph (1), a utility providing electric service may deny a cable

---

[2728] 47 U.S.C. § 251(b)(4).

[2729] A "utility" is "any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-ways used, in whole or in part, for wire communications," but does not include any railroad, any cooperative, or any federally or state-owned entities. 47 U.S.C. § 224(a)(1).

[2730] 47 U.S.C. § 224(f)(1). *See* 47 U.S.C. § 153(44) (definition of "telecommunications carrier").

[2731] 47 U.S.C. § 224(a)(5).

> television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.[2732]

1121. Additionally, we sought comment on section 224(h), which provides:

> Whenever the owner of a pole, duct, conduit, or right-of-way intends to modify or alter such pole, duct, conduit, or right-of-way, the owner shall provide written notification of such action to any entity that has obtained an attachment to such conduit or right-of-way so that such entity may have a reasonable opportunity to add to or modify its existing attachment. Any entity that adds to or modifies its existing attachment after receiving such notification shall bear a proportionate share of the costs incurred by the owner in making such pole, duct, conduit, or right-of-way accessible.[2733]

1122. In this Order, we establish rules implementing these provisions. Based on the comments received and the plain language of the statute, and in furtherance of our original mandate to institute an expeditious procedure for determining just and reasonable pole attachment rates with a minimum of administrative costs and consistent with fair and efficient regulation,[2734] we adopt herein a program for nondiscriminatory access to poles, ducts, conduits and rights-of-way. This Order includes several specific rules as well as a number of more general guidelines that are designed to give parties flexibility to reach agreements on access to utility-controlled poles, ducts, conduits, and rights-of-way, without the need for regulatory intervention. We provide for expedited dispute resolution when good faith negotiations fail, and we establish requirements concerning modifications to pole attachments and the allocation of the cost of such modifications. We also explain the division of responsibility between federal and state regulation envisioned by the 1996 Act.

2. Section 224(f): Non-discriminatory access

a. Background

1123. Pursuant to section 224(f)(1), a utility must grant telecommunications carriers and cable operators nondiscriminatory access to all poles, ducts, conduits, and rights-of-way owned or

---

[2732] 47 U.S.C. § 224(f)(2).

[2733] 47 U.S.C. § 224(h).

[2734] S. Rep. No. 580, 95th Cong., 1st Sess. 19 (1977).

controlled by the utility.[2735] This directive seeks to ensure that no party can use its control of the enumerated facilities and property to impede, inadvertently or otherwise, the installation and maintenance of telecommunications and cable equipment by those seeking to compete in those fields. Section 224(f)(1) appears to mandate access every time a telecommunications carrier or cable operator seeks access to the utility facilities or property identified in that section, with a limited exception allowing electric utilities to deny access "where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes."[2736] While Congress recognized the legitimate interests of utilities in protecting and promoting the safety and reliability of their core services, on balance we believe section 224(f) reflects Congress' determination that utilities generally must accommodate requests for access by telecommunications carriers and cable operators.

b. Comments

1124. The comments relating to nondiscriminatory access describe in substantial detail a wide variety of largely technical issues and concerns. We will review the finer points raised by commenters in subsequent discussion sections devoted to particular issues. Here, we discuss the comments to the extent they provide an overview of access issues and we summarize the positions of the parties generally.

1125. NEES states that, historically, providers of electric and telephone services have installed and maintained transmission and distribution lines overhead and underground.[2737] According to NEES, the methods by which utilities install and maintain facilities vary depending upon a number of factors, including the type of utility service provided, the specific type of equipment being used, and various local conditions and regulations. Utilities state that their facilities often occupy public rights-of-way with other utilities or are constructed on private property pursuant to easements granted by the property owners.[2738] Utilities often are empowered to take property by eminent domain in order to install facilities and provide service.[2739] Because

---

[2735] As noted, a utility's obligations under section 224(f)(1), however, do not extend to incumbent LECs which are excluded from the definition of "telecommunications carriers" under section 224(a)(5). *See infra*, Section E(3)(c) for a discussion of the incorporation of this provision into section 251(b)(4).

[2736] 47 U.S.C. § 224(f)(2).

[2737] Facilities used to transport electricity generally can be divided into transmission facilities and distribution facilities. Transmission facilities deliver bulk power at high voltages across long distances for the ultimate use of a large number of customers. Distribution facilities deliver electricity at lower voltages to individual subscribers within a community. Electric transmission and distribution lines can be installed either on overhead poles and towers, or within underground ducts and conduit. NEES comments at 3.

[2738] PECO comments at 2-3; NEES comments at 4.

[2739] PECO comments at 2-3; Duquesne comments at 14-15.

of economic factors and space considerations, new entrants in the utility fields, as well as providers of cable television and other services, generally must "piggyback" on the poles and conduits of the incumbent utilities in order to provide service.[2740]

1126. The relationship between the general access requirement of section 224(f)(1) and the limited exception contained in section 224(f)(2) reflects long-standing, and sometimes contentious, relationships between utilities and various service providers seeking access to those facilities.[2741] Historically, access to utility poles, conduits, and other facilities has been governed by private pole attachment agreements entered into between the parties in accordance with a patchwork of federal, state, and local regulations and industry standards.[2742] Commenters extensively debate the extent to which our rules implementing section 224(f)(1) and (f)(2) should incorporate various aspects of these standards and requirements. Many utilities claim that existing regulations and standards, including those imposed unilaterally by individual utility companies, should continue to be observed.

1127. Generally, utilities argue that the nondiscrimination obligations set forth in the Act should not be triggered when a utility's facility has not previously been used by cable or telecommunications service providers.[2743] Requiring access accommodation, it is argued, may constitute a taking under the Fifth Amendment takings clause because the right to exclude others from the facility is an inherent attribute of property ownership that would be compromised by mandated access provisions.[2744] Alternatively, some parties suggest that, if access is allowed, utilities should have substantial discretion to set the terms and conditions of such access depending on the nature of the service involved because different technologies present varying levels of risk.[2745] Utilities contend that a wide variety of issues arise in the pole attachment context and that national rules governing questions of access would fail to accommodate the range of concerns that could justify a denial of access.[2746] For this reason, they request that the Commission eschew national rules in favor of individual case adjudication when a cable operator

---

[2740] *See* Cole comments at 1-3 & n. 1-5.

[2741] *See* Cole comments at 1-7; GST comments at 4.

[2742] American Electric comments at 26; Delmarva reply at 7.

[2743] UTC comments at 6-7.

[2744] American Electric Power comments at 7-10. We discuss these comments in more detail in a separate section devoted to constitutional issues. *See infra*, Section C.

[2745] ConEd comments at 12.

[2746] Carolina Power & Light comments at 4; Virginia Electric comments at 13; American Electric comments at 32-38.

or telecommunications carrier is denied access to a utility's pole or other facility.[2747] Electric utilities, in their comments, request that distinctions be made between facilities used for electric power and those used for other services, including telecommunications services.

1128. On the issue of capacity constraints, utilities strongly favor explicit provisions that would allow utilities to reserve capacity sufficient to meet future needs.[2748] They suggest space reservations are critical to enable utilities to meet expansion plans and ensure the fulfillment of existing obligations. For example, reserve space may be needed for the emergency replacement of failed components.[2749] Although capacity can sometimes be expanded, utilities argue for authority to deny access when providing access would require the expansion of existing capacity.[2750] If Congress intended utilities to expand existing capacity to accommodate new service providers, they argue, it would have granted utilities the power of eminent domain for this purpose.[2751]

1129. Utility commenters present various approaches to determining the amount of reserved capacity that should be recognized under the Commission's rules. Some oppose precise quantifiable reservations, advocating instead a case-by-case adjudication of the allowed reservation with deference to a utility's prior practices.[2752] At least one commenter, however, supports quantifiable limits as a safe harbor for access denials and suggests that a utility be permitted to reserve of 25% of remaining pole space.[2753]

1130. As for safety and reliability factors upon which access can be denied, utilities urge the Commission to resist the adoption of specific rules because the circumstances affecting safety and reliability are too diverse for precise regulatory packaging. One commenter suggests that the method of delivering electricity varies among utilities and a single set of safety rules would not account for these varying delivery methods.[2754] Although utilities have indicated that some broad

---

[2747] Duquesne Light comments at 3-4; Public Service Company of New Mexico comments at 5-7; NEES comments at 15.

[2748] PECO comments at 7-8; Duquesne comments at 17; NU System Companies comments at 4-5; American Electric comments at 23-24.

[2749] NU System Companies comments at 5;

[2750] American Electric comments at 21; Kansas City Power & Light comments at 3.

[2751] New Mexico Public Service comments at 15.

[2752] Duquesne comments at 17; NU System Companies comments at 5.

[2753] ConEd comments at 10.

[2754] Duquesne comments at 21.

national safety standards, such as the National Electric Safety Code ("NESC"),[2755] may be useful to guide parties regarding access generally, they argue stricter standards beyond such accepted codes would not be workable. Instead, utilities propose case-by-case adjudication of disputes because the range of applicable circumstances will frustrate attempts at regulatory specificity.[2756]

1131. To some degree, the comments of LECs reflect concerns similar to those expressed by electric utilities. With respect to the definition of nondiscrimination, however, the Commission received a diverse range of opinion from LEC commenters. Some LECs argue that nondiscrimination does not require parity with the access terms that a facility owner provides to itself because the statute does not explicitly require such parity,[2757] or because requiring parity would work an unconstitutional taking by relegating a facility owner to non-owning status.[2758] Other LECs argue that nondiscrimination obligates facility owners to provide access similar to what the owner provides to itself for similar uses.[2759] Another commenter suggests that the requirement of nondiscrimination prohibits discrimination against entities competing against the facility owner's affiliate, but does not necessarily require parity as long as the facility owner does not impose unreasonable impediments on the use of the facility by unaffiliated entities.[2760]

1132. Generally, LECs oppose detailed rules regarding nondiscrimination and access, arguing in favor of flexibility to accommodate individual circumstances,[2761] and to promote private industry negotiation.[2762] LEC commenters cite a variety of situations that, in their view, present circumstances that cannot be regulated beyond the articulation of broad guidelines or principles. They argue against the imposition of standards for determining sufficient capacity because utilities need flexibility to make good faith judgments about future service demands.[2763] One LEC commenter, however, advocates capacity reservations based on a five-year business

---

[2755] 1993 National Electric Safety Code, Institute of Electrical and Electronics Engineers, Inc. (1992).

[2756] PECO comments at 6; NEES comments at 14.

[2757] Ameritech comments at 34; PacTel comments at 19-20.

[2758] GTE comments at 23-24.

[2759] Bell Atlantic comments at 13; NYNEX comments at 14.

[2760] PacTel comments at 19-21.

[2761] PacTel comments at 18.

[2762] SBC comments at 15-16; GTE comments at 22-23; Rural Tel. Coalition at 10.

[2763] USTA comments at 10; Ameritech comments at 37; BellSouth comments at 14-15; PacTel comments at 20.

forecast.[2764]

1133. Similarly, LECs oppose specific standards governing access denials due to safety and engineering concerns. LECs argue that municipal rules have governed this area for years, obviating the need for federal guidelines.[2765] In their view, established safety codes exist and additional standards imposed at the federal level may conflict with these accepted standards.[2766] A wide variety of concerns could affect the safety and reliability of a network and attachments to poles within a network, according to commenters, including wind resistance, local height regulations, working space requirements between attachments, national safety codes and federal and state occupational safety rules.[2767] Although the precise language of section 224(f)(2) allows electric utilities to deny access for safety, reliability, and engineering concerns, LECs contend they confront the same concerns and need the same authority to deny access when safety or network reliability is jeopardized.[2768]

1134. IXCs argue that nondiscrimination requires an incumbent LEC to provide access on the same terms and conditions that apply to the incumbent LEC or its affiliate.[2769] One IXC suggests that all users of poles and rights-of-way should pay the same rate regardless of the service provided. Under this view, uniform pricing would promote incipient competition.[2770] IXCs contend, however, that access obligations are not reciprocal or symmetrical under section 224. Rather, they contend regulatory asymmetry is required under section 251(b)(4) because that section incorporates section 224 which specifically exempts incumbent LECs from the class of entities entitled to access.[2771]

1135. On capacity questions, IXCs argue strongly for limits on the amount of capacity utilities can reserve for future use. Essentially, they contend the reservation of space, if allowed at all, must be circumscribed by precise standards. For example, a reservation might be allowed

---

[2764] SBC comments at 18-19.

[2765] Ameritech comments at 38; GTE comments at 25-26; BellSouth comments at 16-17.

[2766] GTE comments at 25-26; Bell Atlantic comments at 14.

[2767] BellSouth comments at 16-17.

[2768] Bell Atlantic comments at 14; Ameritech comments at 38; NYNEX comments at 14.

[2769] MCI comments at 21; Sprint comments at 16.

[2770] Sprint comments at 17-18.

[2771] *See* 47 U.S.C. § 224(a)(5); AT&T reply at 24. One LEC argues, however, that section 251 obligations apply to all LECs, including IXCs if they become LECs within the meaning of the Act. PacTel reply at 23.

for use within a one-year forecast period.[2772] IXCs also contend that claims of insufficient capacity must be scrutinized carefully and that LECs, to the extent they deny access due to capacity constraints, must carry the burden of proving access requests from competitors cannot be accommodated.[2773]

1136. As for safety and reliability concerns, AT&T argues for specific standards to define circumstances under which access can be denied. Whether or not quantifiable standards are adopted, AT&T suggests that the burden of proof should be on utilities to prove they meet applicable standards because utilities or other facility owners, rather than the parties requesting attachments, would have access to information needed to evaluate a particular claim.[2774] Moreover, AT&T argues, under the literal terms of section 224(f)(2), only electric utilities, not incumbent LECs, have explicit authority to justify access denials based on safety, reliability or engineering concerns.[2775]

1137. CAPS favor a literal construction of nondiscrimination, arguing that a loose definition of the term could entice incumbent LECs and utilities to obstruct competition.[2776] Despite recognition that, for the most part, incumbent LECs have been cooperative in allowing access to poles, they contend that on several occasions, LECs and utilities have obstructed such access.[2777] With respect to capacity sufficiency, CAPS agree with LECs that available capacity is a fact-dependent issue, but encourage the Commission to establish standards that would ensure access when existing facilities can be configured to accommodate new telecommunications entrants.[2778] In addition, they support placing the burden of proof to justify denials of access on LECs and utilities subject to an audit of LEC outside plant records.[2779] Similarly, with respect to safety and reliability issues, CAPS advocate the adoption of standards requiring quantifiable threats to safety or reliability before access can be denied.[2780] They, along with the Telecommunications Resellers Association, also favor imposing proof burdens on LECs and

---

[2772] AT&T comments at 16.

[2773] MCI comments at 23; AT&T comments at 17; Sprint comments at 16-17.

[2774] AT&T comments at 17-18.

[2775] AT&T reply at 11.

[2776] American Communications Services comments at 6.

[2777] American Communications Services comments at 6; GST Telecom comments at 4.

[2778] MFS comments at 10; American Communications Services comments at 7.

[2779] American Communications Services comments at 7; MFS comments at 11.

[2780] MFS comments at 11; GST Telecom comments at 5.

utilities in such cases.[2781] In addition, CAPS support limits on survey or engineering fees that utilities may charge before proceeding with a competitor's attachment or other facility installation.[2782]

1138. Cable operators emphasize that access to poles, conduits and other facilities of LECs and utilities is critical to their ability to compete in the provision of telecommunications services as facilities-based competitors.[2783] Generally, cable operators support a definition of nondiscrimination that ensures that utilities cannot provide access to their facilities that is inferior to that provided to themselves or their affiliates.[2784] Moreover, small cable operators expressed support for the adoption of detailed national rules which they contend will strengthen their ability to negotiate acceptable pole attachment terms.[2785]

1139. With respect to capacity concerns, cable operators urge the Commission to construe narrowly the conditions under which access can be denied based on claims of insufficient capacity. Because access is critical to facilities-based competition, they argue, the Commission should adopt capacity standards that presume the availability of access as long as the new competitor can overcome whatever obstacles stand in the way of making the pole or facility capable of additional attachments.[2786] To underscore the importance of access to facilities-based competition, NCTA notes that Congress explicitly incorporated access to poles, conduits and rights-of-way in both section 251(b)(4) and section 271(c)(2) of the 1996 Act, recognizing that accessibility to such facilities is critical to finding genuine competition in the provision of local exchange service.[2787]

1140. Similarly, with regard to access denials based on claims of safety, reliability or engineering concerns, cable operators support using the NESC as the benchmark for resolving disputes over such issues. To the degree factors or standards other than those set forth in the NESC are relied upon to justify access, cable operators support a presumption that such denials are unreasonable and support the imposition of proof burdens on any LEC or utility making such

[2781] MFS comments at 11; GST Telecom comments at 5; Telecommunications Resellers Assn. comments at 13.

[2782] MFS comments at 11; GST Telecom comments at 6.

[2783] NCTA comments at 3-4.

[2784] Cole comments at 18.

[2785] Small Cable Business Association Comments at 21.

[2786] Summit comments at 1; Cole comments at 17.

[2787] NCTA comments at 12.

claims.[2788]

1141. In their comments, state commissions emphasize their experience in dealing with pole attachment issues. One state commission indicates that its procedures for handling disputes concerning access to poles, conduits, and rights-of-way are sufficient and that any changes in procedures are unnecessary at this time.[2789] Moreover, state Commissions emphasize that the statute itself recognizes the prominent role of state and local regulation in the area of pole attachments, citing the preservation of state preemption of federal rules when a state has regulated in this area.[2790]

1142. With respect to the definition of nondiscrimination, state commissions urge us to ensure that incumbent LECs provide access to poles and other facilities on terms that do not discriminate unreasonably between similarly situated carriers.[2791] The Ohio Consumers' Counsel agrees, suggesting that nondiscrimination requires that LECs provide competitors access on the same terms it provides to itself or its affiliates.[2792] As for the various reasons that may be asserted to justify denial of access, the Ohio Commission and Ohio Consumers' Counsel argue that a heavy burden should be placed on the LEC or utility denying access to demonstrate whenever capacity constraints, safety issues or reliability concerns are claimed for the access denial.[2793]

c. Discussion

(1) Generally

1143. We conclude that the reasonableness of particular conditions of access imposed by a utility should be resolved on a case-specific basis. We discuss below the forum for such resolutions.[2794] The record makes clear that there are simply too many variables to permit any other approach with respect to access to the millions of utility poles and untold miles of conduit

---

[2788] NCTA comments at 12; Cole comments at 18.

[2789] Illinois Commission comments at 72.

[2790] District of Columbia Commission comments at 9.

[2791] Illinois Commission comments at 73-74; Texas Commission comments at 3; California Commission comments at 5.

[2792] Ohio Consumers' Counsel comments at 5-6.

[2793] Ohio Commission comments at 11-12; Ohio Consumers' Counsel comments at 5-6.

[2794] *See infra*, Section E.

in the nation.[2795] The broader access mandated by the Act, in conjunction with the reasonableness variables mentioned here, will likely increase the number of disputes over access. In turn, this may cause small incumbent LECs and small entities to incur the need for additional resources to evaluate, process, and resolve such disputes, as well as to make poles and conduits physically accessible.[2796] We will not enumerate a comprehensive regime of specific rules, but instead establish a few rules supplemented by certain guidelines and presumptions that we believe will facilitate the negotiation and mutual performance of fair, pro-competitive access agreements. We will monitor the effect of this approach and propose more specific rules at a later date if reasonably necessary to facilitate access and the development of competition in telecommunications and cable services. We believe that the rules, guidelines and presumptions established herein strike the appropriate balance between the need for uniformity, on the one hand, and the need for flexibility, on the other, which should minimize the regulatory burdens and economic impact for both small entities and small incumbent LECs.[2797]

1144. We also address the impact on small incumbent LECs. For example, the Rural Telephone Coalition opposes adoption of sweeping national rules because local circumstances will be relevant to disputes over access to poles or rights-of-way.[2798] We have considered the economic impact of our rules in this section on small incumbent LECs. For example, we have adopted a flexible regulatory approach to pole attachment disputes that ensures consideration of local conditions and circumstances.

1145. Our determination not to prescribe numerous specific rules is supported by acknowledgements in the relevant national industry codes that no single set of rules can take into account all of the issues that can arise in the context of a single installation or attachment. The NESC, one of the national codes that virtually all commenters regard as containing reasonable attachment requirements, contains thousands of rules and dozens of tables and figures, all designed to ensure "the practical safeguarding of persons during the installation, operation, or maintenance of electric supply and communication lines and associated equipment."[2799]

1146. For example, with respect to overhead wires, the NESC contains 64 pages of rules dictating minimum "clearances," i.e., the minimum separations between a particular wire, cable,

---

[2795] Delmarva comments at 6.

[2796] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

[2797] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

[2798] RTC comments at 14.

[2799] NESC § 010.

or other piece of equipment and other wires, cables, equipment, structures, and property.[2800] A short list of only a few of the variables in that discussion includes: the type of wire or equipment in question; the type of current being transmitted; the nature of the structure supporting the wires; the proximity and nature of other equipment and structures; the temperature of the conducting element; and the use of the land below the wires. These separation requirements dictate the required distances between various wires and other transmission and distribution equipment, as well distances between such equipment and other objects that are not a part of the transmission and distribution network. Prescribed separations between wires will vary between the point at which wires are attached to a pole and at mid-points between poles, with the latter separations dictated by the predicted amount of sag that the wires will experience. The amount of sag will itself depend upon additional variables. Changing just one variable can radically alter the separation requirements.[2801] Other rules dictate: electrical loading requirements that vary depending upon wind and ice conditions and the predicted sag of the lines being installed; structural strength requirements that vary depending upon the amount and type of installations and the nature of the supporting structure; and line insulation requirements. A wholly separate and equally extensive array of rules apply to underground lines.

1147. Despite this specificity, the introduction to the NESC states that the code "is not intended as a design specification or an instruction manual."[2802] Indeed, utilities typically impose requirements more stringent than those prescribed by NESC and other industry codes.[2803] In some cases stricter requirements and restrictions are dictated by federal, state, or local law.[2804] Potentially applicable federal regulations include rules promulgated by the Federal Energy Regulatory Commission ("FERC") and by the Occupational Safety and Health Administration ("OSHA").[2805] Various restrictions can apply at the state level as well.[2806] Some local requirements governing zoning, aesthetics, or road clearances impose more stringent or more

---

[2800] NESC § 23.

[2801] For example, depending upon other conditions there are at least 16 potentially applicable clearance requirements relating specifically to wires passing over or near swimming pools. Separate sets of clearance requirements apply to wires in the vicinity of rail cars, and for wires attached near bridges.

[2802] NESC § 010.

[2803] NU comments at 4-5; BellSouth comments at 16-17; Virginia Electric comments at 10-12; Carolina comments at 4; NEES comments at 11.

[2804] NEES comments at 6, 11; PECO comments at 2; Duquesne comments at 11-12; Virginia comments at 11-12

[2805] Texas Commission comments at 4; NEES comments at 11; American Electric comments at 25. *See* 29 C.F.R. §§ 1910.268, 1910.269.

[2806] NEES comments at 6 (*citing* Massachusetts statute prohibiting electric utilities from permitting attachments to their transmission facilities); Duquesne comments at 11-12 (describing similar restriction under Wisconsin law).

specific requirements than those of the national industry codes or of federal or state law.[2807]

1148. In addition to operating under federal, state, and local requirements, a utility normally will have its own operating standards that dictate conditions of access.[2808] Utilities have developed their own individual standards and incorporated them into pole attachment agreements because industry-wide standards and applicable legal requirements are too general to take into account all of the variables that can arise.[2809] A utility's individual standards cover not simply its policy with respect to attachments, but all aspects of its business. Standards vary between companies and across different regions of the country based on the experiences of each utility and on local conditions.[2810] As Duquesne notes, the provision of electricity is the result of varied engineering factors that continue to evolve.[2811] Because there is no fixed manner in which to provide electricity, there is no way to develop an exhaustive list of specific safety and reliability standards.[2812] In addition, increasing competition in the provision of electricity is forcing electric utilities to engineer their systems more precisely, in a way that is tailored to meet the specific needs of the electric company and its customers.[2813] As a result, each utility has developed its own internal operating standards to suit its individual needs and experiences.[2814]

1149. The record contains numerous factors that may vary from region to region, necessitating different operating procedures particularly with respect to attachments. Extreme temperatures, ice and snow accumulation, wind, and other weather conditions all affect a utility's safety and engineering practices.[2815] In some instances, machinery used by local industries requires higher than normal clearances. Particular utility work methods and equipment may require specific separations between attachments and may restrict the height of the poles that a

---

[2807] American Electric comments at 36; Delmarva comments at 10-11; Ameritech comments at 38; PECO comments at 2.; Duquesne comments at 11-13; ConEd comments at 11.

[2808] American comments at 26, 36; NEES comments at 11.

[2809] Virginia Power comments at 13; NEES comment at 11; NU comments at 4-5.

[2810] ConEd comments at 5; Duquesne comments at 7; NEES comments at 11.

[2811] Duquesne comments at 21.

[2812] *Id.*; UTC reply at 20.

[2813] Duquesne comments at 21.

[2814] ConEd reply at 2.

[2815] NEES comments at 11; Carolina comments at 4; American Electric comments at 31.

utility will use.[2816] The installation and maintenance of underground facilities raise distinct safety and reliability concerns.[2817] It is important that such variables be taken into account when drafting pole attachment agreements and considering an individual attachment request. The number of variables makes it impossible to identify and account for them all for purposes of prescribing uniform standards and requirements.[2818] Universally accepted codes such as the NESC do not attempt to prescribe specific requirements applicable to each attachment request and neither shall we.

1150. We are sensitive to concerns of cable operators and telecommunications carriers regarding utility-imposed restrictions that could be used unreasonably to prevent access.[2819] We note in particular that a utility that itself is engaged in video programming or telecommunications services has the ability and the incentive to use its control over distribution facilities to its own competitive advantage. A number of utilities have obtained, or are seeking, the right and ability to provide telecommunications or video programming services.[2820] We agree, however, with Duquesne that the best safeguard is not the adoption of a comprehensive set of substantive engineering standards, but the establishment of procedures that will require utilities to justify any conditions they place on access.[2821] These procedures are outlined in section E below. In the next two sections, we set forth rules of general applicability and broader guidelines relating to specific issues that are intended to govern access negotiations between the parties.

(2) Specific Rules

1151. We establish five rules of general applicability. First, in evaluating a request for access, a utility may continue to rely on such codes as the NESC to prescribe standards with respect to capacity, safety, reliability, and general engineering principles. We have no reason to question the reasonableness of the virtually unanimous judgment of the commenters, many of whom have otherwise diverse and conflicting interests, in this regard.[2822] Utilities may incorporate such standards into their pole attachment agreements in accordance with section

---

[2816] American Electric comments at 20; NEES comments at 11; Carolina comments at 4.

[2817] ConEd comments at 7; Kansas City comments at 3-4; UTC reply at 20.

[2818] American Electric comments at 18-20, 36; Delmarva reply at 7-8.

[2819] Cole comments 3-7.

[2820] Cole reply at 3-7.

[2821] Duquesne comments at 21.

[2822] Cole comments at 22; American Electric comments at 22; NCTA reply at 6-7; UTC reply at 15-16; Virginia Power reply at 6; Ohio Edison reply at 23-24.

224(f)(2). Other industry codes also will be presumed reasonable if shown to be widely-accepted objective guides for the installation and maintenance of electrical and communications facilities.

1152. Second, federal requirements, such as those imposed by FERC and OSHA, will continue to apply to utilities to the extent such requirements affect requests for attachments to utility facilities under section 224(f)(1). We see no reason to supplant or modify applicable federal regulations promulgated by FERC, OSHA, or other federal agencies acting in accordance with their lawful authority.

1153. Third, we will consider state and local requirements affecting pole attachments. We note that section 224(c)(1) provides:

> Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms and conditions, or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f), for pole attachments in any case where such matters are regulated by the State.[2823]

1154. In a separate section we discuss the authority of a state to preempt federal regulation of pole attachments.[2824] For present purposes, we conclude that state and local requirements affecting attachments are entitled to deference even if the state has not sought to preempt federal regulations under section 224(c).[2825] The 1996 Act increased significantly the Commission's role with respect to attachments by creating federal access rights and obligations, which for decades had been the subject of state and local regulation. Such regulations often relate to matters of local concern that are within the knowledge of local authorities and are not addressed by standard codes such the NESC.[2826] We do not believe that regulations of this sort necessarily conflict with the scheme established in this Order. More specifically, we see nothing in the statute or in the record that compels us to preempt such local regulations as a matter of course. Regulated entities and other interested parties are familiar with existing state and local requirements and have adopted operating procedures and practices in reliance on those requirements. We believe it would be unduly disruptive to invalidate summarily all such local requirements. We thus agree with commenters who suggest that such state and local requirements should be presumed reasonable.[2827] Thus, even where a state has not asserted preemptive authority in accordance with section 224(c), state and local requirements affecting pole

---

[2823] 47 U.S.C. § 224(c)(1).

[2824] *See infra*, Section E.

[2825] New Mexico comments at 12; Ohio comments at 11.

[2826] *See supra*, Section B.2.

[2827] PECO comments at 2; Kansas City comments at 2-3; NEES reply at 13.

attachments remain applicable, unless a complainant can show a direct conflict with federal policy. Where a local requirement directly conflicts with a rule or guideline we adopt herein, our rules will prevail. We note that a standard prescribed by the NESC is not a specific Commission rule, and therefore a state requirement that is more restrictive than the corresponding NESC standard may still apply.

1155. It is important to note that the discretion of state and local authorities to regulate in the area of pole attachments is tempered by section 253, which invalidates all state or local legal requirements that "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[2828] This restriction does not prohibit a state from imposing "on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."[2829] In addition, section 253 specifically recognizes the authority of state and local governments to manage public rights-of-way and to require fair and reasonable compensation for the use of such rights-of-way.[2830]

1156. Fourth, where access is mandated, the rates, terms, and conditions of access must be uniformly applied to all telecommunications carriers and cable operators that have or seek access.[2831] Except as specifically provided herein, the utility must charge all parties an attachment rate that does not exceed the maximum amount permitted by the formula we have devised for such use, and that we will revise from time to time as necessary.[2832] Other terms and conditions also must be applied on a nondiscriminatory basis.[2833]

1157. Fifth, except as specifically noted below, a utility may not favor itself over other parties with respect to the provision of telecommunications or video programming services.[2834] We interpret the statutory requirement of nondiscriminatory access as compelling this result, particularly when read in the context of other provisions of the statute. This element of

---

[2828] 47 U.S.C. § 253(a).

[2829] 47 U.S.C. § 253(b); section 254 sets forth specific provisions related to universal service.

[2830] 47 U.S.C. § 253(c). *See* Ameritech reply at 10.

[2831] 47 U.S.C. § 224(f)(1). As noted above, incumbent LECs are excluded from the definition of "telecommunications carrier" for purposes of section 224. 47 U.S.C. § 224(a)(5).

[2832] *See* 47 C.F.R. § 1.1404.

[2833] *See supra*, Sections IV.G. and V.G. for a discussion of the meaning of "nondiscriminatory."

[2834] 47 U.S.C. § 224(f)(1); *see* Ohio Consumers' Counsel comments at 5; California comments at 5; MCI comments at 21; Sprint comments at 16; ACSI comments at 6-7.

nondiscrimination is evident in section 224(g), which requires a utility to impute to itself or to its affiliate the pole attachment rate such entity would be charged were it a non-affiliated entity.[2835] Further, we believe it unlikely that Congress intended to allow an incumbent LEC to favor itself over its competitors with respect to attachments to the incumbent LEC's facilities, given that section 224(a)(5) has just the opposite effect in that it operates to preclude the incumbent LEC from obtaining access to the facilities of other LECs. A utility will be able to discriminate in favor of itself with respect to the provision of telecommunications or cable services only as expressly provided herein.

1158. Aside from the conditions described above, we will not adopt specific rules to determine when access may be denied because of capacity, safety, reliability, or engineering concerns. In addition, we reject the contention of some utilities that they are the primary arbiters of such concerns, or that their determinations should be presumed reasonable.[2836] We recognize that the public welfare depends upon safe and reliable provision of utility services, yet we also note that the 1996 Act reinforces the vital role of telecommunications and cable services. As noted above, section 224(f)(1) in particular reflects Congress' intention that utilities must be prepared to accommodate requests for attachments by telecommunications carriers and cable operators.

(3) Guidelines Governing Certain Issues

1159. In addition to the rules articulated above, we will establish guidelines concerning particular issues that have been raised in this proceeding. These guidelines are intended to provide general ground rules upon which we expect the parties to be able to implement pro-competitive attachment polices and procedures through arms-length negotiations, rather than having to rely on multiple adjudications by the Commission in response to complaints or by other forums. We do not discuss herein every issue raised in the comments. Rather, we discuss only major issues that we believe will arise often. Issues not discussed herein may be important in a particular case, but are not susceptible to any general observation or presumption.

1160. We note that a utility's obligation to permit access under section 224(f) does not depend upon the execution of a formal written attachment agreement with the party seeking access. We understand that such agreements are the norm and encourage their continued use, subject to the requirements of section 224. Complaint or arbitration procedures will, of course, be available when parties are unable to negotiate agreements.[2837]

[2835] 47 U.S.C. § 224(g).

[2836] American Electric comments at 14, 21; NEES comments at 14; ConEd comments at 11; Delmarva reply at 8.

[2837] *See infra*, Section E.

(a) Capacity Expansions

1161. When a utility cannot accommodate a request for access because the facility in question has no available space, it often must modify the facility to increase its capacity.[2838] In some cases, a request for access can be accommodated by rearranging existing facilities to make room for a new attachment.[2839] Another method of maximizing useable capacity is to permit "overlashing," by which a new cable is wrapped around an existing wire, rather than being strung separately.[2840] A utility pole filled to capacity often can be replaced with a taller pole.[2841] New underground installations can be accommodated by the installation of new duct, including subducts that divide a standard duct into four separate, smaller ducts.[2842] Cable companies and others contend that there is rarely a lack of capacity given the availability of taller poles and additional conduits.[2843] These commenters suggest that utilities should rarely be permitted to deny access on the basis of a lack of capacity, particularly since under section 224(h) the party or parties seeking to increase capacity will be responsible for all associated costs.[2844] Utilities argue that neither the statute nor its legislative history requires facility owners to expand or alter their facilities to accommodate entities seeking to lease space.[2845] These commenters argue that, if Congress intended such a result, the statute would have imposed the requirement explicitly.[2846]

1162. A utility is able to take the steps necessary to expand capacity if its own needs require such expansion. The principle of nondiscrimination established by section 224(f)(1) requires that it do likewise for telecommunications carriers and cable operators.[2847] In addition, we note that section 224(f)(1) mandates access not only to physical utility facilities (*i.e.*, poles,

---

[2838] Cole comments at 9; ConEd comments at 10; MFS comments at 10; NCTA reply at 5-6.

[2839] GST Telecom comments at 5.

[2840] MFS comments at 10; GST Telecom comments at 5.

[2841] Cole comments at 14-15.

[2842] GST Telecom comments at 5; Cole comments at 17.

[2843] Cole comments at 15.

[2844] NCTA comments at 12; Summit comments at 1; MCI comments at 23.

[2845] American Electric reply at 19; ConEd reply at 5; U S West reply at 7; GTE reply at 26; Virginia Power reply at 5.

[2846] SBC reply at 21.

[2847] AT&T reply at 14-15; MFS reply at 22. We note that this standard differs from the one we adopt for collocation of equipment on incumbent LEC premises under section 251(c)(6). *See supra*, Section VI.

ducts, and conduit), but also to the rights-of-way held by the utility. The lack of capacity on a particular facility does not necessarily mean there is no capacity in the underlying right-of-way that the utility controls. For these reasons, we agree with commenters who argue that a lack of capacity on a particular facility does not automatically entitle a utility to deny a request for access. Since the modification costs will be borne only by the parties directly benefitting from the modification,[2848] neither the utility nor its ratepayers will be harmed, despite the assertions of utilities to the contrary.[2849]

1163. In some cases, however, increasing capacity involves more than rearranging existing attachments or installing a new pole or duct. For example, the record suggests that utility poles of 35 and 40 feet in height are relatively standard, but that taller poles may not always be readily available.[2850] The transportation, installation, and maintenance of taller poles can entail different and more costly practices.[2851] Many utilities have trucks and other service equipment designed to maintain poles of up to 45 feet, but no higher.[2852] Installing a 50 foot pole may require the utility to invest in new and costly service equipment.[2853] Expansion of underground conduit space entails a very complicated procedure, given the heightened safety and reliability concerns associated with such facilities.[2854] Local regulators may seek to restrict the frequency of underground excavations. We find it inadvisable to attempt to craft a specific rule that prescribes the circumstances in which, on the one hand, a utility must replace or expand an existing facility in response to a request for access and, on the other hand, it is reasonable for the utility to deny the request due to the difficulties involved in honoring the request. We interpret sections 224(f)(1) and (f)(2) to require utilities to take all reasonable steps to accommodate requests for access in these situations. Before denying access based on a lack of capacity, a utility must explore potential accommodations in good faith with the party seeking access.

1164. We will not require telecommunications providers or cable operators seeking access to exhaust any possibility of leasing capacity from other providers, such as through a resale

---

[2848] *See infra*, Section 2(b).

[2849] *See, e.g.*, Ohio Ed reply at 19.

[2850] NEES comments at 8; Cole comments at 15.

[2851] Carolina comments at 3-4; American Electric comments at 23.

[2852] NEES comments at 8-9.

[2853] UTC reply at 17.

[2854] American Electric comments at 20, 31; ConEd comments at 7; Kansas City comments at 3-4; UTC comments at 18. Some commenters assert that expanding conduit capacity is impractical. Delmarva reply at 7.

agreement, before requesting a modification to expand capacity.[2855] As indicated elsewhere in this Order, resale will play an important role in the development of competition in telecommunications. However, as we also have noted, there are benefits to facilities-based competition as well. We do not wish to discourage unduly the latter form of competition solely because the former might better suit the preferences of incumbent utilities with respect to pole attachments.

(b) Reservation of space by utility

1165. Utilities routinely reserve space on their facilities to meet future needs.[2856] Local economic growth and property development may require an electric utility to install additional lines or transformers that use previously available space on the pole.[2857] A utility may install an underground duct in which it can later install additional distribution lines, if necessitated by a subsequent increase in demand or by damage to the original lines.[2858] Reserving space allows the utility to respond quickly and efficiently to changed circumstances. This practice, however, also can result in a utility denying access to a telecommunications carrier or a cable operator even though there is unused capacity on the pole or duct.

1166. This issue is of particular concern because section 224(h) imposes the cost of modifying attachments on those parties that benefit from the modification.[2859] If, for example, a cable operator seeks to make an attachment on a facility that has no available capacity, the operator would bear the full cost of modifying the facility to create new capacity, such as by replacing an existing pole with a taller pole. Other parties with attachments would not share in the cost, unless they expanded their own use of the facilities at the same time. If the electric utility decides to change a pole for its own benefit, and no other parties derive a benefit from the modification, then the electric company would bear the full cost of the new pole.

1167. Some commenters contend that utilities will reserve space on a pole and then claim there is no capacity available, as a way of forcing cable operators and telecommunications carriers to pay for new utility facilities. These commenters contend that we should restrict or eliminate

[2855] *See* PNM comments at 20; Carolina comments at 5; American Electric reply at 14.

[2856] American Electric comments at 43; UTC reply at 22.

[2857] Virginia Power comments at 8; American comments at 23; Connecticut Light comments at 5.

[2858] Ohio Edison comments at 16-17; ConEd comments at 9.; Delmarva reply at 5.

[2859] *See infra*, Section (C)(3).

the authority of utilities to reserve space.[2860] Utilities respond that it is unfair to force a utility to accommodate full occupation of its facility by third parties and then to saddle the utility with the cost of modifying the facility when the utility's own needs change and require a costly increase in capacity.[2861]

1168. The near-universal public demand for their core utility services, while imposing certain obligations, arguably entitles utilities to certain prerogatives vis-a-vis other parties, including the right to reserve capacity to meet anticipated future demand for those utility services.[2862] Recognition of such a right, however, could conflict with the nondiscrimination requirement of section 224(f)(1) which prohibits a utility from favoring itself or its affiliates with respect to the provision of telecommunications and video services.[2863] In addition, allowing space to go unused when a cable operator or telecommunications carrier could make use of it is directly contrary to the goals of Congress.

1169. Balancing these concerns leads us to the following conclusions. We will permit an electric utility to reserve space if such reservation is consistent with a bona fide development plan that reasonably and specifically projects a need for that space in the provision of its core utility service. The electric utility must permit use of its reserved space by cable operators and telecommunication carriers until such time as the utility has an actual need for that space. At that time, the utility may recover the reserved space for its own use. The utility shall give the displaced cable operator or telecommunications carrier the opportunity to pay for the cost of any modifications needed to expand capacity and to continue to maintain its attachment.[2864] An electric utility may not reserve or recover reserved space to provide telecommunications or video programming service and then force a previous attaching party to incur the cost of modifying the facility to increase capacity, even if the reservation of space were pursuant to a reasonable development plan. The record does not contain sufficient data for us to establish a presumptively reasonable amount of pole or conduit space subject that an electric utility may reserve. If parties cannot agree, disputes will be resolved on a case-by-case approach based on the reasonableness of the utility's forecast of its future needs and any additional information that is relevant under the circumstances.

[2860] MCI comments at 23; ACSI comments at 6-8; MFS comments at 7; Time Warner comments at 14; AT&T reply at 14-15.

[2861] AEP comments at 42-43; Duquesne comments at 17; PECO comments at 7; Delmarva comments at 14.

[2862] PNM comments at 8-9; American Electric comments at 13; ConEd reply at 4-5.

[2863] Ohio Consumers Counsel comments at 5-6; Delmarva comments at 8.

[2864] This standard differs from the one we adopt for allocation of collocation space under section 251(c)(4). *See supra*, Section VI.

1170. With respect to a utility providing telecommunications or video services, we believe the statute requires a different result. Section 224(f)(1) requires nondiscriminatory treatment of all providers of such services and does not contain an exception for the benefit of such a provider on account of its ownership or control of the facility or right-of-way. Congress seemed to perceive such ownership and control as a threat to the development of competition in these areas, thus leading to the enactment of the provision in question. Allowing the pole or conduit owner to favor itself or its affiliate with respect to the provision of telecommunications or video services would nullify, to a great extent, the nondiscrimination that Congress required. Permitting an incumbent LEC, for example, to reserve space for local exchange service, to the detriment of a would-be entrant into the local exchange business, would favor the future needs of the incumbent LEC over the current needs of the new LEC. Section 224(f)(1) prohibits such discrimination among telecommunications carriers. As indicated above, this prohibition does not apply when an electric utility asserts a future need for capacity for electric service, to the detriment of a telecommunications carrier's needs, since the statute does not require nondiscriminatory treatment of all utilities; rather, it requires nondiscriminatory treatment of all telecommunications and video providers.

(c) Definition of "Utility"

1171. The access obligations of section 224(f) apply to any "utility," which is defined as:

> any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or other rights-of-way used, in whole or in part, for any wire communications. Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State.[2865]

1172. Arguably a provider of utility service does not fall within this definition if it has refused to permit any wired communications use of its facilities and rights-of-way since, in that case, its facilities and rights-of-way are not "used, in whole or in part, for wire communications." Under this construction, an electric utility would have no obligation to grant access under section 224(f) until the utility voluntarily has granted access to one communications provider or has used its facilities for wire communications.[2866] Only after its facilities were being used for wire communications would the utility have to grant access to all telecommunications carriers and cable operators on a nondiscriminatory basis.

1173. We conclude that this construction of the statute is mandated by its plain language

---

[2865] 47 U.S.C. § 224(a)(1).

[2866] NU Systems comments at 2-3; UTC comments at 6-7.

and is indeed nondiscriminatory, since denial of access to all discriminates against none. We see no statutory basis, however, for the argument made by some utilities that they should be permitted to devote a portion of their poles, ducts, conduits, and rights-of-way to wire communications without subjecting all such property to the access obligations of section 224(f)(1).[2867] Those obligations apply to any "utility," which section 224(a)(1) defines to include an entity that controls "poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications."[2868] The use of the phrase "in whole or in part" demonstrates that Congress did not intend for a utility to be able to restrict access to the exact path used by the utility for wire communications. We further conclude that use of any utility pole, duct, conduit, or right-of-way for wire communications triggers access to all poles, ducts, conduits, and rights-of-way owned or controlled by the utility, including those not currently used for wire communications.

1174. We reject the contention that, because an electric utility's internal communications do not pose a competitive threat to third party cable operators or telecommunications carriers, such internal communications are not "wire communications" and do not trigger access obligations.[2869] Although internal communications are used solely to promote the efficient distribution of electricity, the definition of "wire communication" is broad and clearly encompasses an electric utility's internal communications.[2870]

(d) Application of Section 224(f)(2) to Non-Electric Utilities

1175. While all utilities are subject to the access obligations of section 224(f)(1), the provisions of section 224(f)(2), permitting a utility to deny access due to a lack of capacity or for reasons of safety, reliability, and generally applicable engineering purposes, apply only to "a utility providing electric service . . . ."[2871] Based on this statutory language, some commenters suggest that LECs and other utilities that do not provide electric service must grant requests for access, regardless of any concerns relating to safety, reliability, and general engineering principles.[2872] If there is a lack of capacity, a LEC must create more capacity, according to these

---

[2867] *See* American Electric comments at 12, n. 7.

[2868] 47 U.S.C. § 224(a)(1).

[2869] *See* UTC comments at 7; Delmarva reply at 5.

[2870] *See* 47 U.S.C. 3(51) ("The term 'wire communication' . . . means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection . . .").

[2871] 47 U.S.C. § 224(f)(2).

[2872] *See, e.g.*, AT&T comments at 16-17.

commenters.[2873]

1176. While the express language of sections 224(f)(1) and (f)(2) suggests that only utilities providing electric service can take into consideration concerns relating to safety and reliability, we are reluctant to ignore these concerns simply because the pole owner is not an electric utility. Even parties seeking broad access rights under section 224 recognize that, in some circumstances, a LEC will have legitimate safety or engineering concerns that may need to be accommodated.[2874] We believe that Congress could not have intended for a telecommunications carrier to ignore safety concerns when making pole attachment decisions. Rather than reach this dangerous result which would require us to ignore the dictates of sections 1[2875] and 4(o)[2876] of the Communications Act, we conclude that any utility may take into account issues of capacity, safety, reliability and engineering when considering attachment requests, provided the assessment of such factors is done in a nondiscriminatory manner.

1177. Nevertheless, we believe that section 224(f)(2) reflected Congress' acknowledgment that issues involving capacity, safety, reliability and engineering raise heightened concerns when electricity is involved, because electricity is inherently more dangerous than telecommunications services. Accordingly, although we determine that it is proper for non-electric utilities to raise these matters, they will be scrutinized very carefully, particularly when the parties concerned have a competitive relationship.

(e) Third-Party Property Owners

1178. Section 224(f)(1) mandates that the utility grant access to any pole, duct, conduit, or right-of-way that is "owned or controlled by it." Some utilities and LECs argue that certain private easement agreements, when interpreted under the applicable state property laws, deprive the utilities of the ownership or control that triggers their obligation to accommodate a request for access.[2877] Moreover, they contend, access to public rights-of-way may be restricted by state law

---

[2873] *Id.* at 16-17.

[2874] AT&T reply at 17, n. 40

[2875] 47 U.S.C. § 151 (establishing the Commission for the purpose of promoting a "rapid, efficient Nation-wide, and world-wide wire and radio and communication service with adequate facilities . . . [and] promoting safety of life and property . . .").

[2876] 47 U.S.C. § 154 (o) (promoting the "safety of life and property" with respect to the use of radio and wire communications).

[2877] UTC comments at 7-8; GVNW comments at 9; U S West reply at 6; BellSouth reply at 9; *see* BOMA reply at 3.

or local ordinances.[2878] Opposing commenters contend that the addition of cable television or telecommunications facilities is compatible with electric service and therefore does not violate easements that have been granted for the provision of electric service.[2879] These commenters also assert that the statute does not draw specific distinctions between private and public easements.[2880] Further, some cable operators contend that utility easements are accessible to cable operators pursuant to section 621(a)(2) of the Communications Act as long as the easements are physically compatible with such use, regardless of the terms of a written easement agreement.[2881] Another commenter suggests utilities are best positioned to determine when access requests would affect a private easement, foreclosing the need to determine whether a private owner would consent to the requested attachment.[2882] As for local ordinances restricting access to public rights-of-way, one commenter suggests that such restrictions would violate section 253(a) of the Act, which blocks state or local rules that prohibit competition.[2883]

1179. The scope of a utility's ownership or control of an easement or right-of-way is a matter of state law.[2884] We cannot structure general access requirements where the resolution of conflicting claims as to a utility's control or ownership depends upon variables that cannot now be ascertained. We reiterate that the access obligations of section 224(f) apply when, as a matter of state law, the utility owns or controls the right-of-way to the extent necessary to permit such access.

1180. Section 621(a)(2) states that a cable franchise shall be construed as authorizing the construction of cable facilities in public rights-of-way and "through easements . . . which have been dedicated for compatible uses . . . ."[2885] The scope of a cable operator's access to easements under this provision has been the subject of a number of court opinions.[2886] To the extent section

---

[2878] Rural Tel. reply at 4.

[2879] Cole comments at 16-17.

[2880] MFS reply at 16.

[2881] Cole comments at 17; *see* 47 U.S.C. § 541(a)(2).

[2882] AT&T reply at 18.

[2883] Sprint reply at 18.

[2884] *See* S. Rep. No. 580, 95th Cong., 1st Sess. 16 (1977).

[2885] 47 U.S.C. § 541(a)(2).

[2886] *TCI of North Dakota, Inc. v. Schriock Holding Co.*, 11 F.3d 812 (8th Cir. 1993); *Media General Cable of Fairfax, Inc. v. Sequoyah Condominium Council of Co-Owners*, 991 F.2d 1169 (4th Cir. 1993); *Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd.*, 953 F.2d 600 (11th Cir.), *cert. den'd*, 506 U.S. 862 (1992); *Cable*

621(a)(2) has been construed to permit access to easements, a cable operator must be permitted to attach to utility poles, ducts, and conduits within such easements in accordance with section 224(f).

1181. Finally, we disagree with those utilities that contend that they should not be forced to exercise their powers of eminent domain to establish new rights-of-way for the benefit of third parties.[2887] We believe a utility should be expected to exercise its eminent domain authority to expand an existing right-of-way over private property in order to accommodate a request for access, just as it would be required to modify its poles or conduits to permit attachments. Congress seems to have contemplated an exercise of eminent domain authority in such cases when it made provisions for an owner of a right-of-way that "intends to modify or alter such . . . right-of-way . . . ."[2888]

(f) Other Matters

1182. Utilities stress the importance of ensuring that only qualified workers be permitted in the proximity of utility facilities. Some utilities seek to limit access to their facilities to the utility's own specially trained employees or contractors, particularly with respect to underground conduits.[2889] According to these commenters, parties seeking to make attachments to utility facilities should be required to pay for the use of the utility's workers if the utility concludes that only its workers are fit for the job. While we agree that utilities should be able to require that only properly trained persons work in the proximity of the utilities' lines, we will not require parties seeking to make attachments to use the individual employees or contractors hired or pre-designated by the utility. A utility may require that individuals who will work in the proximity of electric lines have the same qualifications, in terms of training, as the utility's own workers, but the party seeking access will be able to use any individual workers who meet these criteria. Allowing a utility to dictate that only specific employees or contractors be used would impede the access that Congress sought to bestow on telecommunications providers and cable operators and would inevitably lead to disputes over rates to be paid to the workers.

1183. Some electric utilities argue that high voltage transmission facilities should not be accessible by telecommunications carriers or cable operators under section 224(f)(1).[2890] These commenters contend that transmission facilities, which are used for high voltage transmissions

---

Investments, Inc. v. Woolley, 867 F.2d 151 (3d Cir. 1989).

[2887] *But see* UTC comments at 15; Ohio Edison comments at 14-15.

[2888] 47 U.S.C. § 224(h).

[2889] Kansas City at 3-4.

[2890] NEES comments at 15-16; PECO comments at 4.

over great distances, are far more delicate and dangerous than local distribution facilities. Permitting attachments to transmission facilities, they argue, poses a greater risk to the safety and reliability of the electric distribution system than is the case with distribution lines. They further state that transmission facilities generally are not located where cable operators and telecommunications carriers need to install facilities. ConEd suggests that transmission towers do not even fall within the scope of the statute.[2891]

1184. Section 224(f)(1) mandates access to "any pole, duct, conduit, or right-of-way," owned or controlled by the utility. The utilities do not suggest that transmission facilities do not use poles or rights-of-way, for which the statute does mandate the right of access. The utilities' arguments for excepting transmission facilities from access requirements are based on safety and reliability concerns. We believe that the breadth of the language contained in section 224(f)(1) precludes us from making a blanket determination that Congress did not intend to include transmission facilities. As with any facility to which access is sought, however, section 224(f)(2) permits the electric utility to impose conditions on access to transmission facilities, if necessary for reasons of safety and reliability. To the extent safety and reliability concerns are greater at a transmission facility, the statute permits a utility to impose stricter conditions on any grant of access or, in appropriate circumstances, to deny access if legitimate safety or reliability concerns cannot be reasonably accommodated.[2892]

1185. We note that some commenters favor a broad interpretation of "pole, duct, conduit, or right-of-way" because that approach would minimize the risk that a "pathway" vital to competition could be shut off to new competitors.[2893] Others argue for a narrow construction of this statutory phrase, contending that Congress addressed access to other LEC facilities elsewhere in the 1996 Act.[2894] We recognize that an overly broad interpretation of this phrase could impact the owners and mangers of small buildings, as well as small incumbent LECs, by requiring additional resources to effectively control and monitor such rights-of-way located on their properties.[2895] We do not believe that section 224(f)(1) mandates that a utility make space available on the roof of its corporate offices for the installation of a telecommunications carrier's transmission tower,[2896] although access of this nature might be mandated pursuant to a request for

---

[2891] ConEd comments at 6.

[2892] 47 U.S.C. § 224(f)(2).

[2893] AT&T comments at 14.

[2894] Ameritech reply at 8; NYNEX reply at 8; PacTel reply at 22.

[2895] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

[2896] *See* Winstar comments at 3.

interconnection or for access to unbundled elements under section 251(c)(6).[2897] The intent of Congress in section 224(f) was to permit cable operators and telecommunications carriers to "piggyback" along distribution networks owned or controlled by utilities, as opposed to granting access to every piece of equipment or real property owned or controlled by the utility.[2898]

1186. The statute does not describe the specific type of telecommunications or cable equipment that may be attached when access to utility facilities is mandated.[2899] We do not believe that establishing an exhaustive list of such equipment is advisable or even possible. We presume that the size, weight, and other characteristics of attaching equipment have an impact on the utility's assessment of the factors determined by the statute to be pertinent -- capacity, safety, reliability, and engineering principles. The question of access should be decided based on those factors.

3. Constitutional Takings

a. Background

1187. The access provisions of section 224(f) restrict the right of a utility to exclude third parties from its property and therefore may raise Fifth Amendment issues.[2900] While we have no jurisdiction to determine the constitutionality of a federal statute, constitutional concerns are relevant for purposes of construing a statute.[2901] For that reason, we here consider the constitutional issues raised in the comments.

b. Comments

1188. A number of utilities suggest that we must construe section 224(f) as permitting them to make the ultimate decision as to whether to grant access to their facilities and rights-of-way, on the grounds that a statute compelling them to grant access would be an unconstitutional

---

[2897] *See supra*, Section VI.B.

[2898] Ohio Edison reply at 12.

[2899] "The term 'pole attachment' means any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility." 47 U.S.C. § 224(a)(4).

[2900] *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

[2901] *Bell Atlantic Telephone Cos. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994).

taking of their private property under the Fifth Amendment.[2902] AEP notes that in *FCC v. Florida Power Corp.* the Supreme Court upheld the 1978 Pole Attachments Act, in part because nothing in that statute compelled utilities "to enter into, renew, or refrain from terminating pole attachment agreements."[2903] By contrast, the Supreme Court held that a state law requiring a landlord to permit a cable operator to install and maintain cable facilities over the landlord's apartment building constituted a taking of private property.[2904] On the basis of these cases, AEP contends: "To pass constitutional muster, the access required under section 224(f)(1) must be voluntary."[2905] Likewise, Puget argues: "If the Commission interprets the act's access requirement broadly as mandating access to the facility owner's property to all who desire it, the Takings Clause would be violated."[2906]

1189. Other utilities argue that the Fifth Amendment is implicated by the access requirements of section 224(f)(1), but stop short of contending that mandating access under the statue renders it unconstitutional. U S West believes that any discussion of access under section 224(f)(1) "would be incomplete without explicit recognition of the fact that such mandatory occupation . . . constitutes the taking of private property. As such, both the Commission and respective state regulatory agencies must ensure that LECs receive just compensation for their taken property."[2907] Virginia Power believes that any mandatory access requirement would result in a taking of private property, and notes "the potential constitutional issue . . . ."[2908] UTC states that forced access "raises serious questions, regarding at least, the taking of property without just compensation."[2909] Finally, GTE suggests that mandatory access under section 224(f)(1) may be unconstitutional as a taking of private property without just compensation, when considered in conjunction with the method by which pole attachment rates will be determined under section 224(e)(2).[2910]

[2902] AEP comments at 7-10; Virginia Electric comments at 4; GTE comments at 23; Puget comments at 3; UTC comments at 4.

[2903] 480 U.S. 245, 251 n. 6 (1987).

[2904] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

[2905] AEP comments at 7.

[2906] Puget comments at 3.

[2907] U S West comments at 16.

[2908] Virginia Power comments at 4.

[2909] UTC comments at 5.

[2910] GTE comments at 23 & n. 24.

1190. Other commenters contend that there are no relevant constitutional issues to be confronted. Cole argues that requiring a utility to connect its facilities with those of other parties is simply a condition of providing utility service.[2911] With respect to LECs, for instance, Cole states: "Part of the obligation of being a regulated telecommunications common carrier is to provide services deemed to be necessary by regulators whether the regulated common carrier 'wants' to provide them or not."[2912] Cole contends that mandatory access to poles and other facilities "has no impact on the applicable constitutional standard."[2913] "As long as the rates for pole space and services are not confiscatory," Cole asserts, "there simply is no taking."[2914] In the alternative, Cole argues that "even if the access provision of section 224(f)(1) does constitute a taking, any argument that the compensation provided by the statute is not compensatory must be decided in a specific case, and not in this generic rulemaking."[2915]

c. Discussion

1191. Section 224(f)(1) mandates that a utility grant access to a requesting telecommunications provider or cable system operator, subject to certain conditions that we discuss elsewhere in this Order. That provision is not reasonably susceptible of a reading that gives the pole owner the choice of whether to grant telecommunications carriers or cable television systems access. Even if such mandatory access results in a taking, we cannot agree that it necessarily raises a constitutional issue. The Fifth Amendment permits takings as long the property owner receives just compensation for the property taken.[2916]

1192. As for the amount of compensation provided under the statute, GTE suggests that mandatory access will result in an unconstitutional taking when considered in conjunction with the methodology for pole attachment rates set forth in section 224(e)(2). We, of course, have no power to declare any provision of the Communications Act unconstitutional.[2917] In any event, we cannot agree. Congress has provided for compensation to pole owners, in the event that they cannot resolve a dispute with telecommunications carriers regarding the charges for use of the

---

[2911] Cole comments at 28.

[2912] *Id.* at 7.

[2913] *Id.* at 29.

[2914] *Id.* at 31 [*citing FPC v. Hope Natural Gas*, 320 U.S. 591, 602 (1944)].

[2915] *Id.* at 31 [*citing WBEN v. United States*, 396 F.2d 601, 618 (2d Cir.), *cert. denied*, 393 U.S. 914 (1968)].

[2916] *Id.*

[2917] *See GTE California v. FCC*, 39 F.3d 940, 946 (9th Cir. 1994) (*citing Johnson v. Robison*, 415 U.S. 361, 368 (1974)).

owners' poles, that would allow them to recover the cost of providing usable space to each entity and two-thirds of the cost of the unusable space apportioned among such users. The Commission soon will initiate a separate rulemaking proceeding that will give greater content to this statutory standard. GTE and others may present their just compensation arguments with respect to the ratemaking standards the Commission adopts in that proceeding. GTE has not shown here, however, how the statutory standard contained in section 224(e) necessarily would deny pole owners just compensation.

4. Modifications

a. Background

1193. In the NPRM we sought comment on section 224(h) which provides:

> Whenever the owner of a pole, duct, conduit, or right-of-way intends to modify or alter such pole, duct, conduit, or right-of-way, the owner shall provide written notification of such action to any entity that has obtained an attachment to such conduit or right-of-way so that such entity may have a reasonable opportunity to add to or modify its existing attachment. Any entity that adds to or modifies its existing attachment after receiving such notification shall bear a proportionate share of the costs incurred by the owner in making such pole, duct, conduit, or right-of-way accessible.[2918]

1194. The NPRM requested comments addressing the manner and timing of the notice that must be provided to ensure a reasonable opportunity to add to or modify its attachment. In addition, we sought comment regarding the establishment of rules apportioning the cost of a modification among the various users of the modified facility. Finally, we requested comment on whether any payment of costs should be offset by the potential increase in revenues to the owner. If, for example, an owner modifies a pole to allow additional attachments that generate additional fees for the owner, should such revenues offset the share of modification costs borne by entities with preexisting access to the pole?

b. Comments

(1) Manner and Timing of Notice

1195. Several commenters state that no firm notice period should be established, due to the impracticalities of applying a single standard to the wide variety of situations that may necessitate modifications. Ameritech argues that the appropriate manner and timing for notice will vary according to local factors, such as the specific facility, the attachment, and the nature,

[2918] 47 U.S.C. § 224(h).

extent and reason for the change.[2919] According to Ameritech, time frames for responding to circumstances will vary according to the reason for the modification, including modifications due to damage, deterioration, technological improvements, public works projects and demand growth. Given these variables, Ameritech contends that rigid notification rules could impair the facility owner's ability to respond to emergencies, and would unnecessarily complicate and delay expansion, improvement and maintenance of facilities.[2920]

1196. Most of the commenters agree that exceptions to any firm notice requirements should be made for emergency situations, such as storm restoration work, and minor modifications.[2921] Electric utilities argue that written notification requirements must not restrict their ability to respond to emergencies, customer complaints or routine maintenance.[2922] Incumbent LECs echo these suggestions.[2923] Duquesne urges an exception to any specific notice requirement where the utility's database does not show that the attachment exists.[2924] Duquesne contends that telecommunications providers often make attachments without prior notice to the utility. Although the utility will discover the attachment when it goes to service the pole, Duquesne argues it should not have to suspend that service to give notice to a communications provider that attached without notice to the utility. As proposed by Duquesne, this exception would sunset in five years, by which time the utility would be required to have an accurate database.[2925]

1197. Those commenters who propose specific notice periods varied widely with regard to what they deem "reasonable" notice: periods of 10,[2926] 30,[2927] 60,[2928] 90,[2929] and 180[2930] days

---

[2919] Ameritech comments at 39.

[2920] *Id.; accord,* ConEd comments at 13; NU System Companies comments at 6.

[2921] Ameritech comments at 39; AT&T reply at 20; Bell Atlantic comments at 15; ConEd comments at 13-14; Delmarva comments at 23-24; Duquesne comments at 24-25; MFS comments at 12; NU System Companies comments at 6.

[2922] Public Service Company of New Mexico comments at 27; Virginia Electric comments at 19; Carolina Power reply at 2; American Electric Power reply at 41-43.

[2923] USTA comments at 10; Bell Atlantic comments at 15; SBC reply at 31-32.

[2924] Duquesne comments at 25.

[2925] *Id.*

[2926] AT&T comments at 20; Delmarva comments at 23-24; Duquesne comments at 24.

[2927] PECO comments at 8. PECO also notes that a period exceeding 30 days may be appropriate in the case of particular rights-of-ways, such as ducts, which have special logistical difficulties and greater expenses associated with them. *Id.* at 9.

were recommended, with at least one commenter requesting a full year's notice before modifications could take place.[2931] In justifying the various notice periods and exceptions presented, commenters cite existing notification periods in standard contracts.[2932] They also express concerns that longer periods would interfere with a utility's ability to allocate work crews and schedule necessary outages efficiently,[2933] that upgrade schedules could be disrupted if a longer period were mandated,[2934] or that longer periods would be necessary to allow users to determine future business and economic needs.[2935] Teleport recommends that modifications which benefit only some users should not interrupt usage by others.[2936]

1198. A number of commenters express a preference for negotiated notification terms.[2937] For example, BellSouth currently negotiates contractual notice provisions with attaching communications providers and expresses concern that these contracts may have to be re-negotiated should rigid notice periods be established.[2938] BellSouth also has online notification programs, which it argues should be recognized as meeting any written notification obligations.[2939] Similarly, NEES points out that a group of New England utilities, local exchange carriers, and cable systems are developing a joint electronic information system for all construction-related notifications, and notes that specific notice requirements could reduce the effectiveness of such a system.[2940] Bell Atlantic argues that any duty of notice should be deemed waived when an

---

[2928] AT&T comments at 20, and AT&T reply at 20; GST Telecom comments at 7; U S West comments at 19.

[2929] Cole comments at 20; MFS comments at 11; Time Warner comments at 15.

[2930] MCI comments at 25.

[2931] Teleport comments at 10.

[2932] Cole comments at 20.

[2933] PECO comments at 8; USTA comments at 10, reply at 9.

[2934] PECO comments at 8.

[2935] Teleport comments at 10.

[2936] *Id.*

[2937] *See, e.g.*, Bell Atlantic comments at 15; GTE comments at 27; Illinois Commission Comments at 72-73; NEES comments at 15-16; PacTel comments at 18; USTA reply at 9.

[2938] BellSouth comments at 17-18.

[2939] *Id.*, at 18 n.39.

[2940] NEES comments at 16.

attachment contract grants the utility modification power as needed.[2941]

(2) Allocation of Costs

1199. Several commenters argue that the circumstances surrounding modifications will vary so greatly that uniform application of a single cost allocation formula is infeasible.[2942] Others propose a variety of cost allocation formulas, including dividing the total cost of the modification by the number of entities modifying their attachments,[2943] tying an entity's share of modification costs to the share of space reserved on the pole for that entity's use,[2944] and applying a total service long-run incremental cost methodology based on proportionate space used by each carrier.[2945] One commenter suggests that costs of modifications should be shared only when the user requests the modification, in which case the user would pay a *pro rata* share of the cost.[2946]

1200. AT&T contends that, while the attacher should pay the cost of the addition, if the addition involves more capacity than is needed by existing users, then the owner should pay the balance, subject to recovery later when other entities seek attachments.[2947] According to AT&T, attachers should not pay the cost of modifications by owner, but should only pay their share of the costs to make the structure accessible.[2948] AT&T adds that owners should not be allowed to charge new attachers for modifications paid for by existing attachers.[2949] PECO argues that if the utility has decided to replace a 50-foot pole with a 55-foot pole, an attaching party should not be permitted to request a 60-foot pole unless the requesting party intended to make a modification necessitating the 60-foot pole within six months. According to PECO, the requesting party should be permitted to reserve space in this manner only if it was willing to cover maintenance,

---

[2941] Bell Atlantic comments at 15.

[2942] Ameritech comments at 39-40; GTE comments at 28; USTA comments at 11; U S West comments at 20.

[2943] Bell Atlantic comments at 16; Delmarva comments at 24-25; Duquesne comments at 26. Duquesne also contends that section 224(e)(1) dictates that any such rule should apply to a party's "proportionate costs" only if the parties are unable to resolve a dispute over such charges. *Id.*

[2944] AT&T comments at 21, reply at 22; MCI comments at 25; USTA comments at 11.

[2945] MCI comments at 24.

[2946] Teleport comments at 11.

[2947] AT&T comments at 19.

[2948] *Id.*, at 21.

[2949] AT&T reply at 22.

insurance, and other operational costs associated with the reserved space.[2950]

1201. Cole observes that an applicant must pay for the make-ready needed to accommodate its own attachments. This would include the cost to pre-existing users to transfer their lines to new locations on the pole, or to install a new pole if such a pole is necessary to accommodate the new attachment.[2951] Cole argues that the new user should be protected from having to pay for preexisting NESC violations that are corrected at the same time the new attachment is made.[2952] In addition, reading sections 224(h) and (i) together,[2953] Cole concludes that, if a change out is required to correct a pre-existing utility violation on the pole, the utility must bear the cost of the change out, and should also be solely responsible for change out costs if the change out is attributable solely to the needs of the utility, such as an increase in the load carried by the utility. Under this approach, if a change out is necessitated by something other than the needs of an entity that already has, or seeks to have, an attachment, then entities with existing attachments must be given an opportunity to maintain or modify their attachments, with each party bearing their own costs. As an example, all attaching parties would share the cost of a new pole that was needed due to a road widening project.[2954]

1202. A few commenters suggest that cost arrangements currently in place in certain states should be considered as possible solutions to this problem. For example, ConEd recommends adoption of the rule which it says is currently applied in New York and is an accepted practice: "If a utility causes an attachment to be modified within two years of an attachment, then the utility is responsible for the modification. (However, if it is the attaching entity, then the provider would be responsible for these costs.) Then, if a modification is made after two years, the provider is required to pay the costs of the modification."[2955] PacTel currently bills the attacher when it modifies a conduit to facilitate space for that attacher; if the modification is to benefit PacTel, PacTel picks up the whole cost. PacTel requests that this approach, which is currently used in California and Nevada, be recognized as a safe harbor under the 1996 Act.[2956] The NU System Companies contend that costs should be borne equally by all parties that have existing attachments on the facility, claiming that this method has generally been

---

[2950] *Id.*

[2951] Cole comments at 18.

[2952] *Id.; accord,* Summit comments at 1.

[2953] Note that section 224 (i) was not the subject of the *Notice.*

[2954] Cole comments at 19.

[2955] ConEd comments at 14.

[2956] PacTel comments at 22.

used among electric and telephone companies in its territories.[2957]

1203. Measuring modification costs poses a separate concern. Electric utilities, for example, contend that modification costs incurred to accommodate an attaching entity impose long-term costs beyond the initial cost of modification. Utilities have argued that the presence of attachments adds to the cost of maintaining and modifying the facility. One commenter suggests that modifications to increase pole height to accommodate attaching parties could impose on utilities additional costs of new trucks to service the pole.[2958] According to this commenter, unless attaching parties cover these added costs, utility owners will be subsidizing attaching parties on a continuous basis.[2959] At the same time, some commenters suggest that facility owners may engage in unnecessary or unduly burdensome modifications, imposing costs that could discourage new entrants from offering telecommunications services.[2960] Other commenters contend that normal market forces will prevent facility owners from making such modifications.[2961]

1204. Delmarva contends that it will be difficult, if not impossible, for the Commission to establish a rule that fairly defines what modifications are "unnecessary or unduly burdensome." Similarly, the NU System Companies argue that limitations on an owner's right to modify a facility and on "unnecessary or unduly burdensome modifications" would potentially and directly interfere with crucial day-to-day utility operations. They further argues that applicable codes, state laws and company standards will generally dictate when and where modifications are needed, and it would be impractical to suggest a "limitation" or standard that could be applied in all cases.[2962] A number of commenters note that if a utility seeks to modify a facility and the attaching carrier will not benefit from the modification, the attaching entity bears none of the costs associated with the modification. Given the large costs associated with such arrangements, this allocation of rearrangement costs will preclude utilities from making any "unnecessary or unduly burdensome" modifications, according to these commenters.[2963]

[2957] NU System Companies comments at 6-7.

[2958] UTC comments at 18.

[2959] *Id.*; *see* Puget Sound comments at 5-6.

[2960] WinStar comments at 8; Teleport comments at 10; GST Telecom comments at 8; NCTA reply at 7-8.

[2961] *See, e.g.*, Bell Atlantic comments at 15, Public Service Company of New Mexico reply at 18-19.

[2962] NU System Companies comments at 7.

[2963] Delmarva comments at 26-27; *accord* Duquesne comments at 28.

1205. Some commenters supported,[2964] while many opposed,[2965] our proposal to require facility owners to offset modification costs with additional revenues from new attachments made possible by those modifications. Several of those opposed to offsetting note that pole owners modify out of necessity, not to attract additional attachers, and any additional revenues generated by the new capacity added through modifications would be speculative.[2966] One commenter notes that offsetting costs by potential additional revenues would be inconsistent with a scheme that allocates the cost of modifications only to those parties who benefit from such modifications.[2967] ConEd adds that the facility belongs to the utility and it therefore should be permitted to receive any revenues it can from the use of those facilities.[2968]

1206. Cole suggests that regular attachment fees paid over the term of a pole attachment agreement constitute a return on the utility's investment in the pole. Cole contends such fees should be minimal if parties with attachments have contributed to the cost of a new pole. "Otherwise," Cole states, "the utility will be recovering a return and other compensation for an investment which was made in part by its tenants."[2969] In such circumstances, Cole recommends that the ongoing rental fee should be limited to the incremental cost to the utility of the attachment.[2970]

c. Discussion

1207. We recognize that, when a modification is planned, parties with preexisting attachments to a pole or conduit need time to evaluate how the proposed modification affects their interest and whether activity related to the modification presents an opportunity to adjust the attachment in a desirable manner.[2971] At the same time, we also recognize that not all adjustments to utility facilities are alike. Some adjustments may be sufficiently routine or minor as to not create the type of opportunity that triggers the notice requirement.[2972] Indeed, it is possible that in

[2964] AT&T comments at 21; GST Telecom comments at 9.

[2965] ConEd comments at 14; Delmarva comments at 25-26; Duquesne comments at 27; NEES comments at 16.

[2966] Bell Atlantic comments at 16; NU Systems comments at 7; NEES comments at 16; PECO comments at 10.

[2967] Duquesne comments at 27.

[2968] ConEd comments at 14.

[2969] Cole comments at 20.

[2970] *Id.*

[2971] Teleport comments at 10; AT&T reply at 20.

[2972] USTA comments at 10; Bell Atlantic comments at 15; MFS comments at 12; SBC reply at 33.

some cases lengthy notice requirements could delay unnecessarily the kinds of modifications that would expedite the onset of meaningful competition in the provision of telecommunications services.[2973] Although the period of advance notice has varied widely among commenters, we note that 60 days has been advocated by several parties.[2974]

1208. Several commenters expressed a preference for negotiated notification terms.[2975] They have explained that circumstances will vary among owners of facilities.[2976] The time needed to commence a modification could vary according to pole conditions, technological improvements and demand growth.[2977] Attaching parties in rural markets may need more time to study facilities than facility users in urban markets.[2978] To demonstrate their ability to develop appropriate negotiated agreements, some commenters have described notice requirements in existing agreements. Such cases, they contend, illustrate that notification rules are unnecessary.[2979]

1209. We conclude that, absent a private agreement establishing notification procedures, written notification of a modification must be provided to parties holding attachments on the facility to be modified at least 60 days prior to the commencement of the physical modification itself. Notice should be sufficiently specific to apprise the recipient of the nature and scope of the planned modification. These notice requirements should provide small entities with sufficient time to evaluate the impact of or opportunities made possible by the proposed modifications on their interests and plan accordingly.[2980] If the contemplated modification involves an emergency situation for which advanced written notice would prove impractical, the notice requirement does not apply except that notice should be given as soon as reasonably practicable, which in some cases may be after the modification is completed. Further, we believe that the burden of requiring specific written notice of routine maintenance activities would not produce a commensurate benefit. Utilities and parties with attachments should exchange maintenance

---

[2973] AT&T reply at 20; USTA reply at 9; U S West reply at 8; Massachusetts Electric, *et al.*, reply at 4-5.

[2974] *See, e.g.*, U S West comments at 19; AT&T comments at 20; GST Telecom comments at 7; AT&T reply at 20; Cincinnati Bell reply at 6.

[2975] GTE comments at 28; PacTel comments at 21-22; Rural Tel. Coalition comments at 16; American Electric Power reply at 40; Ohio Edison reply at 23.

[2976] American Electric Power comments at 46.

[2977] Ameritech comments at 39; Municipal Utilities reply at 6-7; Cincinnati Bell reply at 6.

[2978] GVNW comments at 11.

[2979] PacTel comments at 21-22; BellSouth comments at 17-18; American Electric Power reply at 40.

[2980] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

handbooks or other written descriptions of their standard maintenance practices.[2981] Changes to these practices should be made only upon 60 days written notice. Recognizing that the parties themselves are best able to determine the circumstances where notice would be reasonable and sufficient, as well as the types of modifications that should trigger notice obligations, we encourage the owner of a facility and parties with attachments to negotiate acceptable notification terms.

1210. Even with the adoption of a specific notice period, however, we still encourage communication among owners and attaching parties. Indeed, in cases where owners and users routinely share information about upgrades and modifications, agreements regarding notice periods and procedures are ancillary matters.[2982]

1211. With respect to the allocation of modification costs, we conclude that, to the extent the cost of a modification is incurred for the specific benefit of any particular party, the benefiting party will be obligated to assume the cost of the modification, or to bear its proportionate share of cost with all other attaching entities participating in the modification.[2983] If a user's modification affects the attachments of others who do not initiate or request the modification, such as the movement of other attachments as part of a primary modification, the modification cost will be covered by the initiating or requesting party.[2984] Where multiple parties join in the modification, each party's proportionate share of the total cost shall be based on the ratio of the amount of new space occupied by that party to the total amount of new space occupied by all of the parties joining in the modification. For example, a CAP's access request might require the installation of a new pole that is five feet taller than the old pole, even though the CAP needs only two feet of space. At the same time, a cable operator may claim one foot of the newly-created capacity. If these were the only parties participating in the modification, the CAP would pay two-thirds of the modification costs and the cable operator one-third.

1212. As a general approach, requiring that modification costs be paid only by entities for whose benefit the modification is made simplifies the modification process. For these purposes, however, if an entity uses a proposed modification as an opportunity to adjust its preexisting attachment, the "piggybacking" entity should share in the overall cost of the modification to reflect its contribution to the resulting structural change. A utility or other party that uses a modification as an opportunity to bring its facilities into compliance with applicable safety or

---

[2981] Although we do not offer a definition of "routine maintenance" in this proceeding, we anticipate that the parties to an attachment agreement will have established understandings in this regard. We do not believe that routine maintenance of a facility encompasses actions that would disrupt or impair the service of a facility user.

[2982] Frontier comments at 7.

[2983] NYNEX reply at 8; Carolina Power Reply comments at 3.

[2984] Cole comments at 18; MFS reply at 24.

other requirements will be deemed to be sharing in the modification and will be responsible for its share of the modification cost. This will discourage parties from postponing necessary repairs in an effort to avoid the associated costs.

1213. We recognize that limiting cost burdens to entities that initiate a modification, or piggyback on another's modification, may confer incidental benefits on other parties with preexisting attachments on the newly modified facility. Nevertheless, if a modification would not have occurred absent the action of the initiating party, the cost should not be borne by those that did not take advantage of the opportunity by modifying their own facilities. Indeed, the Conference Report accompanying the passage of the 1996 Act imposes cost sharing obligations on an entity "that takes advantage of such opportunity to modify its own attachments." This suggests that an attaching party, incidentally benefiting from a modification, but not initiating or affirmatively participating in one, should not be responsible for the resulting cost.[2985] As for pole owners themselves, the imposition of cost burdens for modifications they do not initiate could be particularly cumbersome if excess space created by modifications remained unused for extended periods.[2986]

1214. Apart from entities that initiate modifications and preexisting attachers that use the opportunity to modify their own attachments, some entities may seek to add new attachments to the modified facility after the modification is completed to avoid any obligation to share in the cost. If this occurs, the entity initiating and paying for the modification might pay the entire cost of expanding a facility's capacity only to see a new competitor take advantage of the additional capacity without sharing in the cost.[2987] Moreover, entities with preexisting attachments may, due to cost considerations, forgo the opportunity to adjust their attachment only to see a new entrant attach to a pole without sharing the modification cost. To protect the initiators of modifications from absorbing costs that should be shared by others, we will allow the modifying party or parties to recover a proportionate share of the modification costs from parties that later are able to obtain access as a result of the modification. The proportionate share of the subsequent attacher should be reduced to take account of depreciation to the pole or other facility that has occurred since the modification. These provisions are intended to ensure that new entrants, especially small entities with limited resources, bear only their proportionate costs and are not forced to subsidize their later-entering competitors. To the extent small entities avail themselves of this cost-saving mechanism, however, they will incur certain record keeping obligations.[2988]

[2985] GST Telecom comments at 8; MFS comments at 12; NCTA reply at 8.

[2986] Cincinnati Bell reply at 8.

[2987] *See* AT&T comments at 19.

[2988] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

1215. Parties requesting or joining in a modification also will be responsible for resulting costs to maintain the facility on an ongoing basis. We believe determining the method by which to allocate such costs can best be resolved in the context of a proceeding addressing the determination of appropriate rates for pole attachments or other facility uses.[2989] We will postpone consideration of these issues until such time.

1216. We recognize that in some cases a facility modification will create excess capacity that eventually becomes a source of revenue for the facility owner, even though the owner did not share in the costs of the modification.[2990] We do not believe that this requires the owner to use those revenues to compensate the parties that did pay for the modification. Section 224(h) limits responsibility for modification costs to any party that "adds to or modifies its existing attachment after receiving notice" of a proposed modification.[2991] The statute does not give that party any interest in the pole or conduit other than access. Creating a right for that party to share in future revenues from the modification would be tantamount to bestowing an interest that the statute withholds.[2992] Requiring an owner to offset modification costs by the amount of future revenues emanating from the modification expands the category of responsible parties based on factors that Congress did not identify as relevant. Since Congress did not provide for an offset, we will not impose it ourselves. Indeed, a requirement that utilities pass additional attachment fees back to parties with preexisting attachments may be a disincentive to add new competitors to modified facilities, in direct contravention of the general intent of Congress.

5. Dispute Resolution

a. Background

1217. Implementation of the access requirements of sections 224 and 251(b)(4) require the adoption of enforcement procedures. In the NPRM, we sought comment on, among other things, whether to impose upon a utility the burden of justifying its denial of access to its poles, ducts, conduits, and rights-of-way due to lack of capacity, safety, reliability, and engineering issues.[2993]

b. Comments

[2989] BellSouth comments at 18; NYNEX comments at 14; SBC comments at 18.

[2990] AT&T comments at 21; GST Telecom comments at 9; WinStar reply at 8-9.

[2991] 47 U.S.C. § 224(h).

[2992] American Electric Power reply at 46.

[2993] NPRM at para. 223; *see* 47 U.S.C. § 224(f)(2).

1218. With respect to dispute resolution procedures generally, a few commenters note that existing complaint procedure mechanisms have worked well in the cable television pole context and should be adequate in this broader context as well.[2994] Other commenters argue that dispute resolution should be left to the states, with federal intervention only where the states failed to regulate.[2995] Some commenters request that any complaint mechanism established should provide for the expeditious resolution of disputes, with short time frames for responses and final resolution.[2996]

1219. Several commenters argue that, where access has been denied, the party denying access should have the burden of proving that such denial was justified.[2997] Others contend that, historically, cable operators have had the burden of proof in pole attachment cases, and that no principled basis exists for altering historic procedures.[2998] In addition, commenters expressed concern that placing the burden of proof on a utility unfairly presumes bad faith.[2999]

1220. PECO agrees with some cable commenters that the reasonableness of a denial of access should be based on industry safety and operational standards. A restriction on access imposed in accordance with such standards should be irrebuttably presumed reasonable, according to PECO. If the utility seeks to impose stricter standards, the burden would be on the utility to establish the reasonableness of the stricter standard. Predicting the likelihood of fact-intense disputes on such issues, PECO recommends the adoption of adequate dispute-resolution procedures.[3000] Similarly, Cole contends that a utility cannot deny a request for access based upon safety or reliability concerns as long as the applicant is willing to undertake the obligations necessary to comply with NESC standards.[3001] Safety and reliability standards that exceed NESC standards should be presumed unreasonable if they are used to deny access to a pole. The utility

---

[2994] *See, e.g.*, BellSouth reply at 16-17; GTE reply at 29-30; U S West reply at 8.

[2995] ICC comments at 72-73; Bell Atlantic reply at 10-11; GTE reply at 29-30; PacTel reply at 27.

[2996] *See, e.g.*, Joint Cable commenters at 20-22; NEXTLINK comments at 6-7.

[2997] Delmarva comments at 19; Duquesne comments at 22; Joint Cable commenters at 20-22; NEXTLINK comments at 6-7; OCC reply at 6; PUCO Staff comments at 11-12; Sprint reply at 20.

[2998] ConEd comments at 12; American Electric Power reply at 32-36; BellSouth reply at 16-17; SBC reply at 26-27.

[2999] GTE reply at 26-27; NEES comments at 14.

[3000] PECO comments at 6.

[3001] Cole comments at 16.

would then have the burden of showing the reasonableness of such standards.[3002]

1221. Duquesne argues that it is appropriate for the utility to bear the burden of establishing a threat to reliability if that rationale is used to deny access. Once a utility makes a showing, based on an engineering analysis, that the attachments "quantifiably threaten reliability," the burden would shift to the party seeking the attachment to show that the utility's analysis is incomplete or invalid, with the utility holding the ultimate burden of proof.[3003]

c. Discussion

(1) General Complaint Procedures Under Section 224

1222. Section 224(f)(2) provides that an electric utility may deny non-discriminatory access "where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes."[3004] We have determined that other utilities also may consider these concerns when faced with an access request.[3005] A denial of access, while proper in some cases, is an exception to the general mandate of section 224(f). We note that utilities contend that they are in the best position to determine when access should be denied, because they possess the information and expertise to make such decisions and because of the varied circumstances impacting these decisions.[3006] We think it appropriate that the utility bear the burden of justifying why its denial of access to a cable television or telecommunications carrier fits within that exception.[3007] We therefore agree that utilities have the ultimate burden of proof in denial-of-access cases.[3008] We believe this will minimize uncertainty and reduce litigation and transaction costs, because new entrants generally, and small entities in particular, are unlikely to have access to the relevant information without cooperation from the utilities.[3009]

[3002] *Id.*, at 17-18.

[3003] Duquesne comments at 22; *accord* Delmarva Comments at 19.

[3004] *See* 47 U.S.C. § 224(f)(2).

[3005] *See supra*, Section B(1)(c)(2).

[3006] *See generally* Comments of American Electric Power; Delmarva Power and Light; NEES; Puget Sound; Public Service Company of New Mexico; UTC; Virginia Power.

[3007] Public Service Company of New Mexico at 20-23; Delmarva Power and Light at 19; Joint Cable commenters at 18; WinStar reply at 7; Sprint reply at 20.

[3008] Comments of Public Service Company of New Mexico at 20-23; Ohio Consumers' Counsel reply at 6; PUCO Staff comments at 12.

[3009] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

1223. We also agree with Virginia Power that a telecommunications carrier or cable television provider filing a complaint with the Commission must establish a prima facie case.[3010] A petitioner's complaint, in addition to showing that it is timely filed, must state the grounds given for the denial of access, the reasons those grounds are unjust or unreasonable, and the remedy sought. The complaint must be supported by the written request for access, the utility's response, and information supporting its position.[3011] The Commission will deny the petitioner's claim if a prima facie case is not established.[3012] A complaint will not be dismissed if a petitioner is unable to obtain a utility's written response, or if a petitioner is denied any other relevant information by the utility needed to establish a prima facie case. Thus, we expect a utility that receives a legitimate inquiry regarding access to its facilities or property to make its maps, plats, and other relevant data available for inspection and copying by the requesting party, subject to reasonable conditions to protect proprietary information.[3013] This provision eliminates the need for costly discovery in pursuing a claim of improper denial of access, allowing attaching parties, including small entities with limited resources, to seek redress of such denials.[3014]

1224. We agree with the Joint Cable Commenters that "time is of the essence."[3015] The Joint Cable Commenters contend that the Commission should implement an expedited review process for denial of access cases.[3016] By implementing specific complaint procedures for denial of access cases, we seek to establish swift and specific enforcement procedures that will allow for competition where access can be provided.[3017] In order to provide a complete record, written requests for access must be provided to the utility. If access is not granted within 45 days of the request, the utility must confirm the denial in writing by the 45th day. Although these written requirements involve some recordkeeping obligations, which could impose a burden on small incumbent LECs and small entities, we believe that burden is outweighed by the benefits of

---

[3010] Virginia Power comments at 14; American Electric Power comments at 40-42; Carolina Power and Light comments at 5 (*citing* 47 C.F.R. § 1.1409(b)); *see also* SBC comments at 15-17.

[3011] Virginia Power comments at 15 (*citing* 47 C.F.R. § 1.1404(f) and (g)).

[3012] 47 C.F.R. § 1.1409(d).

[3013] AT&T comments at 19; GST comments at 6.

[3014] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601, et seq.

[3015] Joint Cable Commenters reply at 24.

[3016] Joint Cable Commenters reply at 25.

[3017] Joint Cable Commenters reply at 24.

certainty and expedient resolution of disputes which this procedure encourages.[3018] The denial must be specific, and include all relevant evidence or information supporting its denial. It must enumerate how the evidence relates to one of the reasons that access can be denied under section 224(f)(2), *i.e.*, lack of capacity, safety, reliability or engineering standards.

1225. For example, a utility may attempt to deny access because of lack of capacity on a 40-foot pole. We would expect a utility to provide the information demonstrating why there is no capacity. In addition, the utility should show why it declined to replace the pole with a 45-foot pole. Upon the receipt of a denial notice from the utility, the requesting party shall have 60 days to file its complaint with the Commission. We anticipate that by following this procedure the Commission will, upon receipt of a complaint, have all relevant information upon which to make its decision. The petition must be served pursuant to section 1.1404(b) of the Commission's rules.[3019] Final decisions relating to access will be resolved by the Commission expeditiously.[3020] Because we are using the expedited process described herein, we do not believe stays or other equitable relief will be granted in the absence of a specific showing, beyond the prima facie case, that such relief is warranted.

(2) Procedures Under Section 251

1226. A telecommunications carrier seeking access to the facilities or property of a LEC may invoke section 251(b)(4) in lieu of, or in addition to, section 244(f)(1). Because section 251(b)(4) mandates access "on rates terms, and conditions that are consistent with section 224," we believe that the section 224 complaint procedures established above should be available regardless of whether a telecommunications provider invokes section 224(f)(1) or section 251(b)(4), or both.

1227. If a telecommunications carrier seeks access to the facilities or property of an incumbent LEC, however, it shall have the option of invoking the procedures established by section 252 in lieu of filing a complaint under section 224. Section 252 governs procedures for the negotiation, arbitration, and approval of certain agreements between incumbent LECs and telecommunications carriers.[3021] In pertinent part, section 252(a)(1) provides:

[3018] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

[3019] 47 C.F.R. § 1.1404(b).

[3020] We note, however, that if the Commission requests additional information from any party, such party will have 5 days to respond to the request. Failure to provide the requested information within the 5 days, will result in a review of the record provided thus far.

[3021] 47 U.S.C. § 252. The requirements of section 252, and the conditions set forth in this section 3(a) of this Order, do not apply if the party seeking access is not a telecommunications carrier, or if the party receiving the request for access is not an incumbent LEC.

> Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) or (c) of section 251.[3022]

1228. Where parties are unable to reach an agreement under this section, any party may petition the relevant state commission to arbitrate the open issues.[3023] In resolving the dispute, the state commission must ensure, among other things, that the ultimate resolution "meet[s] the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251 . . . . ."[3024] The Commission may assume the state's authority under section 252 if the state "fails to carry out its responsibility" under that section.[3025]

1229. Section 251(c)(1) creates an obligation on the part of an incumbent LEC "to negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements . . . " to fulfill its section 251(b)(4) obligation.[3026] Therefore, a telecommunications carrier may seek access to the facilities or property of an incumbent LEC pursuant to section 251(b)(4) and trigger the negotiation and arbitration procedures of section 252. If a telecommunications carrier intends to invoke the section 252 procedures, it should affirmatively state such intent in its formal request for access to the incumbent LEC. We impose this requirement because the two procedures have separate deadlines by which the parties may or must take certain steps, and therefore the incumbent LEC receiving the request has a need to know which procedure has been invoked. Section 224 shall be the default procedure that will apply if the telecommunications carrier fails to make an affirmative election.

1230. We note that section 252 does not impose any obligations on utilities other than incumbent LECs, and does not grant rights to entities that are not telecommunications providers. Therefore, section 252 may be invoked in lieu of section 224 only by a telecommunications carrier and only if it is seeking access to the facilities or property of an incumbent LEC.

1231. In addition, incumbent LECs cannot use section 251(b)(4) as a means of gaining access to the facilities or property of a LEC. A LEC's obligation under section 251(b)(4) is to afford access "on rates, terms, and conditions that are consistent with section 224." Section 224

[3022] 47 U.S.C. § 251(a).

[3023] 47 U.S.C. § 252(b)(1).

[3024] 47 U.S.C. § 252(c)(1).

[3025] 47 U.S.C. § 252(e)(5).

[3026] 47 U.S.C. § 251(c)(1).

does not prescribe rates, terms, or conditions governing access by an incumbent LEC to the facilities or rights-of-way of a competing LEC. Indeed, section 224 does not provide access rights to incumbent LECs. We cannot infer that section 251(b)(4) restores to an incumbent LEC access rights expressly withheld by section 224. We give deference to the specific denial of access under section 224 over the more general access provisions of section 251(b)(4). Accordingly, no incumbent LEC may seek access to the facilities or rights-of-way of a LEC or any utility under either section 224 or section 251(b)(4).

6. Reverse preemption

a. Background

1232. Even prior to enactment of the 1996 Act, section 224(b)(1) gave the Commission jurisdiction to "regulate the rates, terms, and conditions for pole attachments . . . ."[3027] Under former section 224(c)(1), that jurisdiction was preempted where a state regulated such matters. Such reverse preemption was conditioned upon the state following a certification procedure and meeting certain compliance requirements set forth in sections 224(c)(2) and (3). The 1996 Act expanded the Commission's jurisdiction to include not just rates, terms, and conditions, but also the authority to regulate non-discriminatory access to poles, ducts, conduits and rights-of-way under section 224(f).[3028] At the same time, the 1996 Act expanded the preemptive authority of states to match the expanded scope of the Commission's jurisdiction. section 224(c)(1) now provides:

> Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms and conditions, or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f), for pole attachments in any case where such matters are regulated by the State.[3029]

b. Comments

1233. Cole contends that the nondiscriminatory access provisions of section 224 and our jurisdiction thereunder survive when a telecommunications provider seeks access to the facilities or property of a LEC under section 251(b)(4), even where such matters are regulated by a

[3027] 47 U.S.C. § 224(b)(1).

[3028] 47 U.S.C. § 224(f).

[3029] 47 U.S.C. § 224(c)(1).

state.[3030] Cole notes that section 251(b)(4) requires LECs to afford access to its facilities and rights-of-way to competing telecommunications carriers "on rates, terms, and conditions that are consistent with section 224," with no reference to the possibility of state regulation.[3031] Cole further cites the competitive checklist of section 271 which requires an RBOC to provide such access "in accordance with the requirements of section 224," but which does not provide for state regulation of access.[3032] Cole argues that neither section 251 nor section 271 exempts a LEC or BOC from the access requirements of section 224 where the state has undertaken regulation of such matters. Cole argues that allowing states to preempt federal authority "would defeat the purpose of the Act to promote access" to local facilities.[3033]

1234. Similarly, Nextlink contends that the Commission's access requirements should apply to any LEC that receives an access request under section 251(b)(4), regardless of whether a state has attempted to assert jurisdiction under section 224(c).[3034] Nextlink describes section 251 as "an entirely separate section providing entirely different bases for Commission jurisdiction."[3035]

1235. Other commenters argue that a request for access under section 251(b)(4) always implicates section 224, including the provisions of section 224(c)(1) that allow the states to preempt federal regulation.[3036] The District of Columbia Commission argues that section 251(b)(4) only requires that access be given "'on rates, terms and conditions that are consistent with section 224.'"[3037] Thus, this commenter asserts that any federal regulation of access under section 251(b)(4) is subject to the state's authority under section 224(c)(1).[3038] Bell Atlantic agrees, arguing that the only obligation of section 251(b)(4) is to provide access consistent with section 224 and that providing access in accordance with a valid scheme of state access regulations meets this requirement, regardless of any federal access requirements that otherwise

---

[3030] Cole reply at 26-27.

[3031] 47 U.S.C. § 251(b)(4); *see* Cole comments at 26-27.

[3032] 47 U.S.C. § 271(c)(2)(b)(iii); *see* Cole comments at 27.

[3033] Cole reply at 27.

[3034] Nextlink reply at 5.

[3035] *Id.*

[3036] Ameritech comments at 33; NYNEX comments at 11-12; USTA reply at 7.

[3037] District of Columbia Commission comments at 9, *quoting* 47 U.S.C. § 251(b)(4).

[3038] *Id.*

would apply.[3039] UTC states that "the statute clearly gives the states authority to establish access requirements if they elect to assert jurisdiction."[3040]

c. Discussion

1236. To resolve this issue, we will begin with access requests that can arise solely under section 224(f)(1). These circumstances include when a cable system or telecommunications carrier seeks access to the facilities or rights-of-way of a non-LEC utility. In such cases, the expansion of the Commission's authority to require utilities to provide nondiscriminatory access under section 224(f) is countered by a corresponding expansion in the scope of a state's authority under section 224(c)(1) to preempt federal requirements. The authority of a state under section 224(c)(1) to preempt federal regulation in these cases is clear.[3041]

1237. The issue becomes more complicated when a telecommunications carrier seeks access to LEC facilities or property under section 251(b)(4). By its express terms, section 251(b)(4) imposes upon LECs, "[t]he duty to afford access to the poles, ducts, conduits, and rights-of-way of such a carrier to competing providers of telecommunications services on rates, terms and conditions that are consistent with section 224."[3042] We believe the reference in section 251(b)(4) to section 224 incorporates all aspects of the latter section, including the state preemption authority of section 224(c)(1). This interpretation is consistent not only with the plain meaning of the statute but with the overall application of sections 251 and 252.

1238. In the 1996 Act, Congress expanded section 224(c)(1) to reach access issues. Congress' clear grant of authority to the states to preempt federal regulation in these cases undercuts the suggestion that Congress sought to establish federal access regulations of universal applicability. Moreover, we do not find it significant that the access provisions of sections 251 and 271 contain no specific reference to the preemptive authority of states under section 224(c)(1), since both provisions expressly refer to section 224 generally.

1239. Thus, when a state has exercised its preemptive authority under section 224(c)(1), a LEC satisfies its duty under section 251(b)(4) to afford access by complying with the state's regulations. If a state has not exercised such preemptive authority, the LEC must comply with the

---

[3039] Bell Atlantic comments at 12.

[3040] UTC reply at 29.

[3041] As in other circumstances, and subject to certain limitations, the Commission may preempt an otherwise valid state or local access requirement that "prohibit[s] or ha[s] the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunication service." 47 U.S.C. § 253(a).

[3042] 47 U.S.C. § 254(b)(1)(4).

federal rules. Similarly, when a telecommunications carrier seeks access rights from an incumbent LEC by choosing to avail itself of the negotiation and arbitration procedures established in section 252, a state that has exercised its preemption rights will apply its own set of regulations in the arbitration process pursuant to section 252 (c)(1). Finally, we note that state regulation in this area is subject to the provisions of section 253.

1240. We note that Congress did not amend sections 224(c)(2) to prescribe a certification procedure with respect to access (as distinct from the rates, terms, and conditions of access). Therefore, upon the filing of an access complaint with the Commission, the defending party or the state itself should come forward to apprise us whether the state is regulating such matters.[3043] If so, we shall dismiss the complaint without prejudice to it being brought in the appropriate state forum. A party seeking to show that a state regulates access issues should cite to state laws and regulations governing access and establishing a procedure for resolving access complaints in a state forum. Especially probative will be a requirement that the relevant state authority resolve an access complaint within a set period of time following the filing of the complaint.[3044]

C. IMPOSING ADDITIONAL OBLIGATIONS ON LECS

1. Background

1241. Section 251(c) imposes obligations on incumbent LECs in addition to the obligations set forth in sections 251(a) and (b). It establishes obligations of incumbent LECs regarding: (1) good faith negotiation; (2) interconnection; (3) unbundling network elements; (4) resale; (5) providing notice of network changes; and (6) collocation.

1242. Section 251(h)(1) defines an incumbent LEC as a LEC within a particular service area that: (1) as of the enactment of the 1996 Act, provided telephone exchange service in such area; and (2) as of the enactment of the 1996 Act, was deemed to be a member of the exchange carrier association pursuant to 47 C.F.R. § 69.601(b) or, on or after the enactment of the 1996 Act, became a successor or assign of such carrier. Section 252(h)(2) provides that, "[t]he Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if (A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1); (B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and (C) such treatment is consistent with the public interest, convenience, and necessity and the purposes

---

[3043] Our rules require service of a pole attachment complaint on both the defending utility and the state. 47 C.F.R. § 1.1404(b).

[3044] *See* 47 U.S.C. § 224(c)(3) (establishing deadlines for states to take final action on complaints concerning the rates, terms, or conditions of access).

of this section."[3045]

1243. In the NPRM, we sought comment on whether we should establish at this time standards and procedures by which interested parties could prove that a particular LEC should be treated as an incumbent LEC. We also sought comment on whether carriers that are not deemed to be incumbent LECs under section 251(h) may be required to comply with any or all of the obligations that apply to incumbent LECs, and whether states may impose on non-incumbent LECs the obligations that are imposed on incumbent LECs under section 251(c).[3046]

2. Comments

1244. Most parties that commented on the issue contend that the Commission should not establish in this proceeding standards and procedures for determining whether a LEC should be treated as an incumbent LEC.[3047]

1245. Many incumbent LECs and state commissions contend that it is not inconsistent with the Act for states to impose the requirements in section 251(c) on carriers that do not fall within the 1996 Act's definition of incumbent. These parties note that sections 251(d)(3), 252(e)(3), and 253(b) permit states to impose additional requirements on carriers.[3048] State commissions allege that they are in the best position to determine when it is appropriate to impose particular obligations on new entrants.[3049] These parties contend that state imposition of reciprocal obligations would be equitable,[3050] and would help promote fair negotiation and realistic demands by the new entrants.[3051]

[3045] 47 U.S.C. § 252(h)(2).

[3046] NPRM at paras. 44-45.

[3047] BellSouth comments at 10; NCTA comments at 15 n.46; Sprint comments at 10; Time Warner comments at 14; *contra* PacTel comments at 16.

[3048] *See, e.g.*, BellSouth comments at 10; California Commission comments at 12; Illinois Commission comments at 19-20 (it is not inconsistent with the Act for states to impose additional obligations on non-incumbents, although it would not be permissible for FCC to do so); Ohio Commission comments at 21-22; PacTel comments at 16; Pennsylvania Commission comments at 19.

[3049] *See, e.g.*, District of Columbia Commission comments at 14.

[3050] *See, e.g.*, Colorado Commission comments at 14-15; MECA comments at 18; Municipal Utilities comments at 10-12 (reciprocal obligations should be permitted as long as they are allowed under state law and city charter); Ohio Consumers' Counsel comments at 5-6 (the loop is a bottleneck regardless of whether the provider is an incumbent or a new entrant); Ohio Commission reply at 8.

[3051] *See, e.g.*, MCI comments at 16, 20; New Jersey Commission at 1.

1246. Potential local competitors argue that states may not impose any of the requirements of section 251(c) on non-incumbent LECs.[3052] These parties contend that the 1996 Act specifically imposes different, and additional obligations on incumbent carriers.[3053] In addition, these parties contend that imposing the same regulatory obligations on non-incumbents is unnecessary because they lack market power,[3054] and is contrary to Congress's desire to facilitate new entry into the local telephone market.[3055] In addition, they assert that section 251(h)(2), which gives the FCC authority to determine when to treat additional carriers as incumbent LECs, would be meaningless if states could decide on their own to subject any LEC to obligations imposed by section 251(c) on incumbent LECs.[3056] Some parties assert that states already impose reciprocal obligations on new entrants, or require them to comply with requirements the 1996 Act only imposes on incumbent LECs.[3057]

3. Discussion

1247. We conclude that allowing states to impose on non-incumbent LECs obligations that the 1996 Act designates as "Additional Obligations on Incumbent Local Exchange Carriers," distinct from obligations on all LECs,[3058] would be inconsistent with the statute.[3059] Some parties

---

[3052] *See, e.g.*, MCI comments at 5 n.7; MFS comments at 10; TCI comments at 14.

[3053] *See, e.g.*, ACTA comments at 5; Comcast comments at 17; Sprint comments at 10; Cox reply at 41; ICTA reply at 5.

[3054] *See, e.g.*, Comcast comments at 15-16; DoJ comments at 7 (absent a showing of market power, there is no basis for imposing additional obligations on new entrants); MCI comments at 5 n.7; Cox reply at 40; Time Warner reply at 11.

[3055] *See, e.g.*, Continental comments at 18; Metricom comments at 2 (imposing such requirements on non-dominant carriers would hinder competition); NEXTLINK comments at 15-16 (for states to impose additional obligations on non-incumbent LECs could constitute a barrier to entry in violation of section 253); Cox reply at 41; ICTA reply at 6 (imposing 251(c) requirements on new entrants would raise costs and thereby discourage potential competitors from entering the local market).

[3056] *See, e.g.*, GST comments at 3-4; MFS comments at 10; Time Warner comments at 15 (fact that Congress authorizes the FCC (but not state commissions) to impose incumbent obligations on the FCC suggests that Congress did not intend to give states that authority); TCI reply at 12; Teleport reply at 36.

[3057] TCI comments at 14 n.23; *see also* Colorado Commission comments at 11-12 (stating that it exempts new entrants from certain rules for a period of three years, after which the new entrant must demonstrate the continued need for such exemption); Illinois Commission comments at 19 (stating that it imposes intraLATA presubscription and line-side interconnection obligations on new entrants for policy reasons).

[3058] *Compare* 47 U.S.C. §§ 251(b) and 251(c).

assert that certain provisions of the 1996 Act, such as sections 252(e)(3) and 253(b), explicitly permit states to impose additional obligations. Such additional obligations, however, must be consistent with the language and purposes of the 1996 Act.

1248. Section 251(h)(2) sets forth a process by which the FCC may decide to treat LECs as incumbent LECs. Thus, when the conditions set forth in section 251(h)(2) are met, the 1996 Act contemplates that new entrants will be subject to the same obligations imposed on incumbents. While we find that states may not unilaterally impose on non-incumbent LECs obligations the 1996 Act expressly imposes only on incumbent LECs, we find that state commissions or other interested parties could ask the FCC to classify a carrier as an incumbent LEC pursuant to section 251(h)(2). At this time, we decline to adopt specific procedures or standards for determining whether a LEC should be treated as an incumbent LEC. Instead, we will permit interested parties to ask the FCC to issue an order declaring a particular LEC or a class or category of LECs to be treated as incumbent LECs. We expect to give particular consideration to filings from state commissions. We further anticipate that we will not impose incumbent LEC obligations on non-incumbent LECs absent a clear and convincing showing that the LEC occupies a position in the telephone exchange market comparable to the position held by an incumbent LEC, has substantially replaced an incumbent LEC, and that such treatment would serve the public interest, convenience, and necessity and the purposes of section 251.[3060]

[3059] We understand that some states may be imposing on non-incumbent LECs obligations set forth in section 251(c). *See, e.g.*, Colorado Commission comments at 11-12; Draft Decision, State of Connecticut Department of Public Utility Control, Docket No. 94-10-04 at 60, 65 (Connecticut Commission July 11, 1996); Illinois Commission comments at 19. We believe that these actions may be inconsistent with the 1996 Act.

[3060] 47 U.S.C. § 251(h)(2).

XII. EXEMPTIONS, SUSPENSIONS, AND MODIFICATIONS OF SECTION 251 REQUIREMENTS

A. BACKGROUND

1249. Section 251(f)(1) grants rural telephone companies an exemption from section 251(c), until the rural telephone company has received a bona fide request for interconnection, services, or network elements, and the state commission determines that the exemption should be terminated.[3061] Section 251(f)(2) allows LECs with fewer than two percent of the nation's subscriber lines to petition a state commission for a suspension or modification of any requirements of sections 251(b) and (c). Section 251(f) imposes a duty on state commissions to make determinations under this section, and establishes the criteria and procedures for the state commissions to follow. In the NPRM, we tentatively concluded that state commissions have the sole authority to make determinations under section 251(f). In addition, we sought comment on whether we should issue guidelines to assist state commissions when they make determinations regarding exemptions, suspensions, or modifications under section 251(f).

1250. Although subsections (f)(1) and (f)(2) both address the circumstances under which an incumbent LEC could be relieved of duties otherwise imposed by section 251, subsection 251(f)(2) also applies to non-incumbent LECs. The standard for determining whether to exempt a carrier under subsection 251(f)(1) is different from the standard for determining whether to grant a suspension or modification under subsection (f)(2). Subsection 251(f)(1)(B) requires state commissions to determine that terminating a rural exemption is consistent with the universal service provisions of the 1996 Act.[3062] Subsection 251(f)(2)(A)(i) requires state commissions to grant a suspension or modification if it is necessary to "avoid a significant adverse economic impact on users of telecommunications services generally," and subsection 251(f)(2)(B) requires a suspension or modification to be "consistent with the public interest, convenience, and necessity."[3063] Although we address these two subsections together, we highlight instances in which we believe that differences in statutory language require different treatment by state

---

[3061] A rural telephone company is defined as a local exchange carrier operating entity to the extent that such entity "(A) provides common carrier service to any local exchange carrier study area that does not include either– (i) any incorporated place of 10,000 inhabitants or more, or any part thereof . . .; or (ii) any territory, incorporated or unincorporated, included in an urbanized area . . .; (B) provides telephone exchange service, including exchange access, to fewer than 50,000 access lines; (C) provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or (D) has less than 15 percent of its access lines in communities of more than 50,000 on the date of enactment of the Telecommunications Act of 1996." 47 U.S.C. § 153(37).

[3062] The provision states, "the State commission shall terminate the exemption if the request . . . is consistent with section 254 (other than subsections (b)(7) and (c)(1)(D) thereof)." 47 U.S.C. § 251(f)(1)(B).

[3063] 47 U.S.C. § 251(f)(2).

commissions.

1251. We discuss below issues raised by the commenters, and establish some rules regarding the requirements of section 251(f) that we believe will assist state commissions as they carry out their duties under section 251(f). For the most part, however, we expect that states will interpret the requirements of section 251(f) through rulemaking and adjudicative proceedings. We may in the future initiate a Notice of Proposed Rulemaking on certain additional issues raised by section 251(f) if it appears that further action by the Commission is warranted.

B. NEED FOR NATIONAL RULES

1. Comments

1252. Most state commissions[3064] and some other parties[3065] assert that states should have exclusive responsibility for the guidelines and determinations made under this section. Several commenters contend that any guidelines the Commission might issue would be useless, because generalized national guidelines could not take into account the variations among states and among individual LECs.[3066] For example, the Minnesota Independent Coalition argues that the additional grant of authority to states under section 214(e) confirms that state commissions have the sole authority to make determinations under section 251(f).[3067] A number of small telephone companies and associations of LECs advocate mandatory national rules regarding implementation of section 251(f). They assert that such rules would ensure that states carry out this provision in accordance with congressional intent.[3068] Some commenters favor a middle ground, claiming that non-mandatory guidelines from the Commission would be helpful, but that mandatory requirements would conflict with the Act's delegation to the states to make determinations under

[3064] *See, e.g.*, Alaska Commission comments at 6; Alabama Commission comments at 33-34; California Commission comments at 46; Idaho Commission comments at 14; Illinois Commission comments at 84; Louisiana Commission comments at 22-23; Ohio Commission comments at 80; Oregon Commission comments at 31; Pennsylvania Commission comments at 42; Texas Commission comments at 34; Wyoming Commission comments at 38-39.

[3065] Ad Hoc Telecommunications Users Committee comments at 11; ALLTEL comments at 16; Citizens Utilities comments at 34; Colorado Ind. Tel. Ass'n comments at 5-6; GVNW comments at 42; GTE comments at 80; Home Tel. comments at 1; Illinois Ind. Tel. Ass'n comments at 7; Minnesota Ind. Coalition comments at 14; Ohio Consumers' Counsel reply at 25-26; PacTel comments at 99; Puerto Rico Tel. reply at 16-17; Rural Tel. Coalition comments at 11-15.

[3066] Minnesota Ind. Coalition comments at 14; Western Alliance comments at 7.

[3067] Minnesota Ind. Coalition comments at 14.

[3068] Anchorage Tel.Utility comments at 2-4; Bay Springs, *et al.* comments at 10; Centennial Cellular Corp. comments at 12; Alaska Tel. Ass'n comments at 6; Matanuska Tel. Ass'n comments at 5; USTA comments at 87-93.

section 251(f).[3069]

2. Discussion

1253. We agree with parties, including small incumbent LECs, who argue that determining whether a telephone company is entitled, pursuant to section 251(f), to exemption, suspension, or modification of the requirements of section 251 generally should be left to state commissions.[3070] Requests made pursuant to section 251(f) seek to carve out exceptions to application of the section 251 rules that we are establishing in this proceeding. We find that Congress intended the section 251 requirements, and the Commission's implementing rules thereunder, to apply to all carriers throughout the country, except in the circumstances delineated in the statute. We find convincing assertions that it would be an overwhelming task at this time for the Commission to try to anticipate and establish national rules for determining when our generally-applicable rules should *not* be imposed upon carriers. Therefore, we establish in this Order a very limited set of rules that will assist states in their application of the provisions in section 251(f).

1254. Many parties have proposed varying interpretations of the provisions in section 251(f), and have asked for Commission determination or a statement of agreement. Because it appears that many parties welcome some guidance from the Commission, we briefly set forth our interpretation of certain provisions of section 251(f). Such statements will assist parties and, in particular, state commissions that must make determinations regarding requests for exemption, suspension, and modification.

C. APPLICATION OF SECTION 251(f)

1. Comments

1255. Some commenters urge the Commission to require states to grant exemptions, suspensions, or modifications only on a case-by-case basis, and only to the extent warranted by the particular circumstances. They ask the Commission to prohibit states from granting broad-scale or generalized exemptions, suspensions or modifications.[3071] AT&T argues that, to ensure that states do not allow LECs to avoid the regulatory and policy framework that Congress has mandated, the Commission should clarify that states must narrowly tailor suspensions and

---

[3069] Kentucky Commission comments at 7; Anchorage Tel. Utility comments at 4. Several parties argue that any federal action should not be mandatory. Ohio Commission comments at 80; Citizens Utilities comments at 33; Colorado Ind. Tel. Ass'n comments at 6; Rural Tel. Coalition reply at 18-19.

[3070] *See, e.g.*, Minnesota Ind. Coalition comments at 14; Rural Tel. Coalition comments at 11.

[3071] *See, e.g.*, Centennial Cellular Corp. comments at 16; NCTA comments at 64; Vanguard reply at 21-22.

modifications to protect against specific, identifiable harm.[3072] Telecommunications Carriers for Competition and GCI argue that section 251(f) allows states to delay imposing the requirements under section 251(b) and (c), but it does not allow states to protect LECs from those requirements indefinitely.[3073] In response, Rural Tel. Coalition and SNET state that, while the term "suspensions" could be interpreted as allowing a time delay in implementation, the addition of the term "modifications" allows states to act more broadly.[3074] SNET favors allowing the states "broad discretion to change the nature of any requirement imposed by subsections (b) and (c)."[3075] USTA argues that states should not be permitted to eliminate all exemptions for all carriers.[3076]

1256. A number of parties allege that the Commission should encourage or require states to establish a legal presumption that the LEC seeking an exemption, suspension, or modification must prove to the state commission that such request is merited under the criteria set forth in section 251(f). AT&T argues that a carrier petitioning for suspension or modification under section 251(f)(2) should be obliged to demonstrate that "the application to it of the [s]ection 251(b) or (c) obligations that are the subject of its petition would inflict substantial harm on the LEC and customers in its territories that would not be inflicted on larger LECs and customers in their territories."[3077] SCBA asserts that the burden should be upon the incumbent LEC, which has strong disincentives to promote competitive entry.[3078] Local exchange carriers contend, on the other hand, that the party making a request under section 251(b) or (c) should have to prove that an exemption, suspension, or modification is not justified. For example, TCA, Inc. argues that, because of the high cost of providing telephone service in rural areas, competing carriers should be required to prove that competition will benefit a given rural area.[3079] Bay Springs, *et al.* and Bogue, Kansas argue that rural carriers should benefit from a presumption that they continue to qualify for the exemption in section 251(f)(1).[3080] SNET suggests that, if a LEC makes a *prima*

[3072] AT&T comments at 90-93; *accord* Ohio Consumers' Counsel reply at 26.

[3073] GCI comments at 16-19; TCC comments at 51-53, reply at 28.

[3074] Rural Tel. Coalition reply at 19-20; SNET comments at 36-37.

[3075] SNET comments at 36-37.

[3076] USTA comments at 87; Continental comments at 17 (citing actions of New Hampshire and Connecticut Commissions); Rural Tel. Coalition reply at 25.

[3077] AT&T comments at 92-93; *contra* Cincinnati Bell reply at 14; PacTel reply at 41; SNET reply at 8; USTA reply at 35-36.

[3078] SCBA comments at 17.

[3079] TCA comments at 10.

[3080] Bay Springs, *et al.* comments at 11; Bogue, Kansas comments at 8; *contra* Classic Tel. reply at 9.

facie case in its petition for suspension or modification, the state should automatically grant a temporary suspension of section 251(b) and (c) obligations, as allowed by section 251(f)(2).[3081]

1257. USTA, some rural LECs, and several other parties advocate that the Commission clarify what constitutes a bona fide request under section 251(f)(1).[3082] USTA recommends that a bona fide request must include, at a minimum: (1) a request for service to begin within one year from the date of the request, with a minimum one-year service period; (2) identification of the points where interconnection is sought, specification of network components and quantities needed, and the date when interconnection is desired; and (3) an indication that the requesting carrier is willing to agree to pay charges sufficient to compensate the LEC for all costs incurred in fulfilling the terms of the interconnection agreement as part of the agreement. USTA also contends that the states should be allowed to mandate longer minimum service periods and require competitive providers to post bonds or submit deposits to ensure that a rural telephone company does not bear the cost of interconnection.[3083] Anchorage Telephone Utility claims that simply responding to requests for interconnection imposes a tremendous burden and expense on rural telephone companies, and that rural LECs should not have to respond to requests that do not meet minimum criteria.[3084] Several parties state that they do not believe that generalized form letter requests should be considered a bona fide request.[3085]

1258. Other commenters either favor a broader definition of a bona fide request or oppose federal standards entirely.[3086] NCTA and GCI argue that a request for interconnection

---

[3081] SNET comments at 37; *see also* Anchorage Tel. Utility comments at 3-4; Cincinnati Bell comments at 41-42; USTA comments at 91-93.

[3082] Anchorage Tel. Utility comments at 5; Bay Springs, *et al.* at 10; Bogue, Kansas comments at 7; NECA comments at 12; TDS reply at 5-6; USTA comments at 87-88; *see also* Kentucky Commission comments at 7.

[3083] USTA comments at 87-88; *accord* Anchorage Tel. Utility comments at 6-7 (carriers that ultimately do not order the items identified in a request for interconnection, services, or network elements should be required to reimburse the incumbent LEC for the costs of responding to such request); Matanuska Tel. Ass'n comments at 5.

[3084] Anchorage Tel. Utility comments at 6 (reporting the receipt of two letters "purporting to request interconnection." "One is a 1-page letter that simply asserts a need for interconnection. The other is an 8-page, single-spaced letter that demands detailed technical, operational and cost information on practically every facet of Anchorage Tel. Utility's local exchange service, without providing any indication of what the requesting carrier actually plans, needs or wants"); *accord* NECA reply at 10-11 (any bona fide request standard should permit LECs to recover costs of responding to requests and enable LECs to avoid unnecessary costs in responding to requests); TDS reply at 5-6.

[3085] TDS reply at 5; Anchorage Tel. Utility comments at 6; Rural Tel. Coalition reply at 24-25.

[3086] *See, e.g.*, Louisiana Commission comments at 22-23 (opposing any attempt by the Commission to define a standard for bona fide requests); *see also* Western Alliance comments at 7 n.16.

should be presumed bona fide until a rural telephone company shows that it is not. They object to a bona fide request requirement, such as the one proposed by USTA, that includes burdensome "pre-filing" requirements as a condition for state review under section 251(f).[3087]

1259. Subsection 251(f)(2) applies to LECs "with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide."[3088] Several parties suggest that the Commission clarify which carriers meet the numerical standard.[3089] AT&T and a number of other parties argue that the 2 percent should be applied at the holding company level in order to ensure that no BOC operating company can apply for a suspension or modification under this subsection.[3090] Some parties further question whether Tier 1 LECs should be allowed to petition for suspension or modification under subsection (f)(2).[3091] Other parties argue that the two percent statutory cut-off is not a loophole and that the statutory standard should not be altered by the Commission to exclude Tier 1 LECs.[3092] PacTel suggests that the standard should be applied at the operating company level because section 251(f)(2) by its terms applies to "local exchange carrier[s]" not local exchange carriers "and their affiliates."[3093]

1260. Some parties recommend that the Commission offer guidance on how to determine whether a request for exemption, modification, or suspension should be granted.[3094] For example, sections 251(f)(1) and (f)(2) both include consideration of "technical feasibility" in deciding whether to grant an exemption, suspension, or modification. Some parties urge the Commission to clarify whether the standard for determining technical feasibility for purposes of section 251(f)

[3087] NCTA comments at 26-27; GCI reply at 17-18; *but see* USTA reply at 37 (disagreeing that its proposal would constitute "pre-filing" requirements).

[3088] 47 U.S.C. § 251(f)(2).

[3089] BellSouth comments at 76; Ohio Consumers' Counsel comments at 47-48.

[3090] AT&T comments at 90-93; Lincoln Tel. reply at 9-10; GCI reply at 17; TCC reply at 28; Ohio Consumers' Counsel argues that this interpretation is sound because section 251(f)(2) discusses the number of lines "in the aggregate nationwide," and individual operating companies do not operate on a nationwide scale. Ohio Consumers' Counsel reply at 26.

[3091] AT&T comments at 92; TLD comments at 6-7; Centennial Cellular Corp. comments at 12-15.

[3092] Alaska Tel. Ass'n comments at 6; Cincinnati Bell comments at 40, reply at 13; Lincoln Tel. comments at 10-11.

[3093] PacTel reply at 40-41.

[3094] *See, e.g.*, NCTA comments at 63-67 (urging a very limited construction of the exemption, suspension and modification provisions); *contra* Western Alliance reply at 7; Rural Tel. Coalition reply at 21-22.

is different than the technical feasibility standard set forth in sections 251(b) and (c).[3095] Sections 251(f)(1) and (f)(2) require the states to consider whether a request is "unduly economically burdensome."[3096] Generally, comments from rural LECs and others contend that smaller LECs cannot afford to hire staff to respond to requests, or expend funds for additional facilities or operational systems without jeopardizing their financial stability.[3097] In contrast, other parties argue that LECs should not be relieved of any duties otherwise imposed by sections 251(b) and (c) merely because they would require the expenditure of funds.[3098]

1261. Some incumbent LECs recommend that carriers that compete with rural LECs should be required to assume some of the universal service obligations of rural carriers.[3099] They argue that, without such safeguards, competing LECs will enter rural markets and take the incumbent LECs' profitable customers. USTA argues that state commissions should be encouraged to grant waivers until universal service issues are resolved.[3100] Commenters also propose varying interpretations of what constitutes "significant adverse impact on users."[3101] USTA proposes that the definition include any request that would cause a LEC to "have difficulty raising sufficient investment capital, and where the remaining customers . . . would likely bear an increase in rates or a reduction in service to cover a shortfall or subsidy to a new entrant."[3102] TLD proposes that the Commission establish a numerical benchmark, for example, that more than 50 percent of the users would suffer a rate increase of at least 20 percent before a request would be considered in violation of subsection (f)(2)(A)(i).[3103]

3. Discussion

[3095] *See, e.g.*, Bay Springs, *et al.* comments at 11; Lincoln Tel. comments at 23-24; SNET comments at 35; USTA comments at 92; Rural Tel. Coalition reply at 22-23.

[3096] 47 U.S.C. § 251(f).

[3097] A number of parties argue that, if smaller and rural LECs cannot recover their total costs, including any required investments and costs associated with developing rate levels and modifying support systems, the request should be deemed unduly economically burdensome. *See, e.g.*, USTA comments at 92; SNET comments at 36; TLD comments at 2; Lincoln Tel. comments at 23-25; TLD comments at 11-13.

[3098] *See, e.g.*, NCTA comments at 64 n.218.

[3099] Bay Springs, *et al.* comments at 12; TLD comments at 5; *accord* NECA comments at 11.

[3100] USTA comments at 91; *but see* NCTA reply at 25-26.

[3101] 47 U.S.C. § 251(f)(2)(A)(i).

[3102] USTA comments at 92.

[3103] TLD comments at 11.

1262. Congress generally intended the requirements in section 251 to apply to carriers across the country, but Congress recognized that in some cases, it might be unfair or inappropriate to apply all of the requirements to smaller or rural telephone companies.[3104] We believe that Congress intended exemption, suspension, or modification of the section 251 requirements to be the exception rather than the rule, and to apply only to the extent, and for the period of time, that policy considerations justify such exemption, suspension, or modification. We believe that Congress did not intend to insulate smaller or rural LECs from competition, and thereby prevent subscribers in those communities from obtaining the benefits of competitive local exchange service. Thus, we believe that, in order to justify continued exemption once a bona fide request has been made, or to justify suspension, or modification of the Commission's section 251 requirements, a LEC must offer evidence that application of those requirements would be likely to cause undue economic burdens beyond the economic burdens typically associated with efficient competitive entry. State commissions will need to decide on a case-by-case basis whether such a showing has been made.

1263. Given the pro-competitive focus of the 1996 Act, we find that rural LECs must prove to the state commission that they should continue to be exempt pursuant to section 251(f)(1) from requirements of section 251(c), once a bona-fide request has been made, and that smaller companies must prove to the state commission, pursuant to section 251(f)(2), that a suspension or modification of requirements of sections 251(b) or (c) should be granted. We conclude that it is appropriate to place the burden of proof on the party seeking relief from otherwise applicable requirements. Moreover, the party seeking exemption, suspension, or modification is in control of the relevant information necessary for the state to make a determination regarding the request. A rural company that falls within section 251(f)(1) is not required to make any showing until it receives a bona fide request for interconnection, services, or network elements. We decline at this time to establish guidelines regarding what constitutes a bona fide request. We also decline in this Report and Order to adopt national rules or guidelines regarding other aspects of section 251(f). For example, we will not rule in this proceeding on the universal service duties of requesting carriers that seek to compete with rural LECs. We may offer guidance on these matters at a later date, if we believe it is necessary and appropriate.

1264. We find that Congress intended section 251(f)(2) only to apply to companies that, at the holding company level, have fewer than two percent of subscriber lines nationwide. This is consistent with the fact that the standard is based on the percent of subscriber lines that a carrier has "*in the aggregate nationwide.*"[3105] Moreover, any other interpretation would permit almost any company, including Bell Atlantic, Ameritech, and GTE affiliates, to take advantage of the suspension and modification provisions in section 251(f)(2). Such a conclusion would render the two percent limitation virtually meaningless.

[3104] 47 U.S.C. § 251(f).

[3105] 47 U.S.C. 251(f)(2) (emphasis added).

1265. We note that some parties recommend that, in adopting rules pursuant to section 251, the Commission provide different treatment or impose different obligations on smaller or rural carriers.[3106] We conclude that section 251(f) adequately provides for varying treatment for smaller or rural LECs where such variances are justified in particular instances. We conclude that there is no basis in the record for adopting other special rules, or limiting the application of our rules to smaller or rural LECs.

[3106] For example, the Rural Tel. Coalition argues that interconnection and collocation points should be set in a flexible manner to take into account size and volume differences among carriers. Rural Tel. Coalition comments at 31.

XIII. ADVANCED TELECOMMUNICATIONS CAPABILITIES

1266. Section 706(a) provides that the Commission "shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."[3107] In the NPRM, we sought comment on how we can advance Congress's section 706(a) goal within the context of our implementation of sections 251 and 252.[3108]

1267. A number of parties suggest that rules allowing them to compete effectively and earn a profit in the telecommunications industry would assist the industry in providing telecommunications services to all Americans.[3109] MFS suggests that "all LECs should be required, as a condition of eligibility for universal service subsidies, to meet network modernization standards for rural telephone companies."[3110] Several state commissions indicate that they have already established programs to assist institutions eligible under section 706 in deploying advanced telecommunications services.[3111] The Alliance for Public Technology asserts that section 706 should underlie all of the FCC's proceedings.[3112] Ericsson states that the industry should work with government agencies to promote leading edge technology to ensure that it is introduced on a reasonably timely basis. For example, it contends that "Plug and Play Internet use" will greatly help the public and schools access information, and that advanced technology such as asynchronous transfer mode (ATM), wireless data/video, and AIN will enhance interconnection capabilities of public and private networks.[3113] The Illinois Commission contends that, depending on the pricing standard the Commission adopts for interconnection and access to unbundled elements, and the Commission's interpretation of the prohibition against discrimination, the Commission should adopt special rules for carriers when they provide interconnection or access to unbundled network elements to serve a school, library, or healthcare

---

[3107] 47 U.S.C. § 706(a).

[3108] NPRM at para. 263.

[3109] Colorado Ind.Tel. Ass'n comments at 6; COMAV comments at 60-61; GVNW comments at 42; Illinois Ind. Tel. Ass'n comments at 7; Louisiana Commission comments at 24-27.

[3110] MFS comments at 88.

[3111] Illinois Commission comments at 85; Louisiana Commission comments at 24-27; Texas Commission comments at 36.

[3112] Alliance for Public Technology reply at 1-5.

[3113] Ericsson comments at 7-8.

provider.[3114]

1268. We decline to adopt rules regarding section 706 in this proceeding. We intend to address issues related to section 706 in a separate proceeding.

[3114] Illinois Commission comments at 86.

XIV. PROVISIONS OF SECTION 252

A. Section 252(e)(5)

1. Background

1269. Section 252(e)(5) directs the Commission to assume responsibility for any proceeding or matter in which the state commission "fails to act to carry out its responsibility" under section 252.[3115] In the NPRM, we asked whether the Commission should establish rules and regulations necessary to carry out our obligation under section 252(e)(5).[3116] In addition, we sought comment on whether in this proceeding we should establish regulations necessary and appropriate to carry out our obligations under section 252(e)(5). In particular, we sought comment on what constitutes notice of failure to act, what procedures, if any, we should establish for parties to notify the Commission, and what are the circumstances under which a state commission should be deemed to have "fail[ed] to act" under section 252(e)(5).[3117]

1270. Section 252(e)(4) provides that, if the state commission does not approve or reject (1) a negotiated agreement within 90 days, or (2) an arbitrated agreement within 30 days, from the time the agreement is submitted by the parties, the agreement shall be "deemed approved."[3118] We sought comment on the relationship between this provision and our obligation to assume responsibility under section 252(e)(5). We also sought comment on whether the Commission, once it assumes the responsibility of the state commission, is bound by all of the laws and standards that would have applied to the state commission, and whether the Commission is authorized to determine whether an agreement is consistent with applicable state law as the state commission would have been under section 252(e)(3).[3119] In addition, we sought comment on whether, once the Commission assumes responsibility under section 252(e)(5), it retains jurisdiction, or whether that matter or proceeding subsequently should be remanded to the state.

1271. Finally, we sought comment on whether we should adopt, in this proceeding, some standards or methods for arbitrating disputes in the event we must conduct an arbitration under section 252(e)(5). We noted some of the benefits and drawbacks of both "final offer" arbitration and open-ended arbitration, and asked for comment on both.

[3115] 47 U.S.C. § 252(e)(5).

[3116] NPRM at ¶ 265.

[3117] NPRM at ¶ 266.

[3118] 47 U.S.C. § 252(e)(4).

[3119] NPRM at ¶ 267.

2. Comments

1272. The majority of the parties that commented on this issue assert that the Commission should establish guidelines under which it will carry out its responsibilities under section section 252(e)(5).[3120] The Illinois Commission, for example, argues that regulations are needed in order to avoid jurisdictional disputes that may arise.[3121] Some parties, on the other hand, argue that it is not critical for the Commission at this time to develop rules governing the arbitration process.[3122] The Pennsylvania Commission, for example, argues that such rules should be adopted in this proceeding only if the Commission perceives a real possibility that it will be asked in the near future to arbitrate an interconnection agreement.[3123]

1273. A broad range of parties comment on what constitutes a "failure to act" and whether the Commission should establish a definition and procedures for interested parties to notify us if a state commission fails to act.[3124] The Illinois Commission, for example, argues that, upon receipt of a petition to mediate or arbitrate, or a BOC statement of generally available terms, the state commission should issue and serve upon the Commission a notice of its intent to act. This will put the Commission and interested parties on notice that the state commission intends to act.[3125] Some state commissions argue that "failure to act" occurs only if the state commission fails to respond to a request for mediation or arbitration, or fails to issue an arbitration decision within nine months after the incumbent LEC receives a request for interconnection under section 252.[3126]

1274. Other parties contend that failure to act should mean that a state commission has

---

[3120] *See, e.g.*, Jones Intercable comments at 16-18; California Commission comments at 49; Illinois Commission comments at 87; MCI comments at 94-95; BellSouth comments at 78; Cable & Wireless comments at 50-51; Time Warner comments at 104-105; Oregon Commission comments at 4.

[3121] Illinois Commission comments at 87.

[3122] *See, e.g.*, Pennsylvania Commission comments at 42; PacTel comments at 99; Iowa Commission comments at 7; GTE comments at 80-81.

[3123] Pennsylvania Commission comments at 42.

[3124] *See, e.g.*, Illinois Commission comments at 89; District of Columbia comments at 40; Ohio Commission comments at 81-82; Time Warner comments at 106-107; PacTel comments at 99; Jones Intercable comments at 16 (failure to act occurs where a state fails to respond to a request for arbitration or fails to render a decision on time in arbitration).

[3125] Illinois Commission comments at 89.

[3126] District of Columbia Commission comments at 40; Ohio Commission comments at 81-82; *accord* Cable & Wireless comments at 51.

not taken any steps to act upon a request for arbitration, or has not taken any steps to approve an arbitrated agreement within the time set out in section 252(e)(4).[3127] Jones argues that a failure to act occurs where a state fails to respond to a request for arbitration or fails to render a decision on time in the arbitration proceeding.[3128] Ohio Consumers' Counsel contends that failure to carry out a state's responsibility means more than mere inaction, and that, for example, willfully disregarding the standards in section 252(e)(2) for approving or disapproving agreements might also "constitute a failure to act to carry out its responsibility" under section 252.[3129] USTA argues that, where there has been no agreement and the state fails to act, the Commission must step in and, in some instances, the Commission may need to step in to arbitrate or mediate before an agreement has been reached.[3130]

1275. Regarding the relationship between sections 252(e)(5) and 252(e)(4), most commenters assert that, if a state fails to approve a negotiated agreement within 90 days, or an arbitrated agreement within 30 days, the agreement will be deemed approved, and no Commission action is required.[3131] These parties contend that approval or disapproval of negotiated or arbitrated agreements are not reviewable by the Commission, but that aggrieved parties may seek relief in the appropriate federal district court.

1276. A number of commenters believe that it is important that procedures be in place for interested parties to notify the Commission if a state fails to act. These parties argue that notice of failure to act should be in writing, and should contain the relevant factual circumstances including the provision of the statute under which the state allegedly has failed to act.[3132] They contend that notice should be given to allow interested parties and the state adequate time to respond. MCI asserts that existing Commission procedures are adequate. MCI argues that any notice of an alleged state commission failure to act should set forth relevant facts and the

---

[3127] *See, e.g.*, Oregon Commission comments at 4; California Commission comments at 47; Ohio Consumers' Counsel comments at 49; Texas Commission comments at 36-37.

[3128] Jones Intercable comments at 16.

[3129] Ohio Consumers' Counsel comments at 49; *see also* California Commission comments at 48 (an agreement automatically approved because the state did not act within the specified time frame should not be deemed to be in compliance with state law).

[3130] USTA comments at 93-94.

[3131] *See, e.g.*, USTA comments at 93-94; Illinois Commission comments at 88; BellSouth comments at 79; Jones Intercable comments at 15; Time Warner reply at 106-107; PacTel comments at 99.

[3132] *See, e.g.*, Ohio Commission comments at 81; Ohio Consumers' Counsel comments at 49; Illinois Commission comments at 89-90.

Commission should place the item on public notice.[3133]

1277. A majority of the commenting parties argue that, if the Commission assumes the responsibility of a state commission, it should be bound by laws and standards that would have applied to the state commission.[3134] These parties allege that this approach would produce consistent results, and that Congress did not intend to create another forum with a separate set of rules. Time Warner, on the other hand, argues against the Commission being bound by state law.[3135]

1278. Parties disagree over whether authority would revert back to the states once the Commission assumes a state commission's responsibility. A number of state commissions argue that the Commission does not retain jurisdiction; it only assumes jurisdiction over a particular proceeding or matter but does not substitute for the state commission on an ongoing basis.[3136] The District of Columbia Commission asserts that, at any time, the state should be able to petition the Commission to reconsider its decision to preempt, and such petitions should be granted upon a reasonable assurance the state intends to carry out its obligations.[3137] A number of parties contend that, once the Commission assumes jurisdiction over a proceeding or matter, it should retain jurisdiction.[3138] Teleport, for example, argues that the Commission "should not risk returning jurisdiction to a state that has demonstrated an ineptitude for implementing interconnection agreements."[3139] Pacific Telesis and Cable and Wireless argue that any agreement arbitrated by the Commission must be submitted to the state for approval.[3140]

[3133] MCI comments at 95.

[3134] *See, e.g.*, PacTel comments at 13-14 (if there is any conflict between the Commission's own rules and requirements of that state, the Commission must lay aside its rules and enforce the state's); California Commission comments at 48; Illinois Commission comments at 90; BellSouth comments at 79; Ohio Commission comments at 82; Louisiana Commission comments at 28 (specific questions concerning a state's law could be certified to the state); SBC comments at 105.

[3135] Time Warner comments at 107-108 (the Commission's authority to interpret state law is suspect, and the Commission lacks the resources and expertise to sit as a trier of law in fifty jurisdictions).

[3136] *See, e.g.*, Ohio Commission comments at 81; Louisiana Commission comments at 28; Pennsylvania Commission comments at 43; District of Columbia Commission comments at 40-41; BellSouth comments at 80.

[3137] District of Columbia Commission comments at 40-41.

[3138] *See, e.g.*, Teleport comments at 89; Jones Intercable comments at 17; Time Warner comments at 109; Oregon Commission comments at 5 (failure by the state to act on one agreement should not vest jurisdiction over other agreements or matters).

[3139] Teleport comments at 89.

[3140] PacTel comments at 100; Cable & Wireless comments at 52.

1279. The vast majority of commenters recommend that the Commission adopt standards for arbitrating disputes in the event that it assumes responsibility under section 252(e)(5).[3141] These parties assert that sufficiently detailed rules should ensure fair and expeditious handling of arbitrations. A few of the commenters favor national rules governing state arbitration proceedings.[3142] SCBA, for example, favors national standards requiring state commissions to use abbreviated, lower cost arbitration proceedings for small cable operators.[3143] The majority of commenters, however, argue against national rules that would govern state arbitration proceedings.[3144]

1280. There is also significant disagreement regarding whether final-offer arbitration should be the arbitration model adopted by the Commission in the event the Commission must conduct the arbitration itself. A broad range of parties argue that final offer arbitration would result in reasonable recommendations to the arbitrator.[3145] Vanguard argues that the "final offer" method of arbitration should permit post-offer negotiation by the parties and allow the parties to tailor counter-proposals.[3146] Under this approach, the Commission would permit negotiation to continue after arbitration offers are exchanged in order to promote negotiated settlements.[3147]

1281. Many competitors oppose a "final offer" arbitration standard.[3148] Sprint, for example, argues that "final-offer" arbitration works well when there is a single, narrowly defined issue on the table, but, where there are numerous complex technical and economic issues, confronting the arbitrator with an "either/or" choice leaves insufficient flexibility to achieve a

---

[3141] *See, e.g.*, Teleport comments at 85-86; MFS comments at 89-90; CompTel comments at 108; MCI comments at 95-96; Ohio Consumers' Counsel comments at 50; SBC comments at 99; Kentucky Commission comments at 7; Ohio Commission comments at 83; Illinois Commission comments at 91; Timer Warner comments at 109; Jones Intercable comments at 18; Vanguard comments at 35-37; Association of Telemessaging Services International reply at 18.

[3142] *See, e.g.*, Vanguard comments at 35-37; Time Warner comments at 109.

[3143] SCBA comments at 11-12.

[3144] *See, e.g.*, Oregon Commission reply at 11; Ohio Commission comment at 81; NARUC reply at 14; Illinois Commission at 91.

[3145] *See, e.g.*, Teleport comments at 88; USTA comments at 94-95; SBC comments at 103;

[3146] Vanguard comments at 39-40.

[3147] *Id.* at 40.

[3148] *See, e.g.*, MCI comments at 95-96; Sprint reply at 47; Time Warner comments at 111; Competitive Policy Institute reply at 21-22; GCI reply at 5.

result that comports with section 251.[3149] In addition, Sprint asserts that, because arbitration proceedings have a public interest component that sets them apart from mere private disputes, neither party's offer might serve the public interest.[3150] Some parties recommend an "open-ended" arbitration system,[3151] while California is in favor of a hybrid between the two.[3152]

1282. SBC contends that Congress did not intend for arbitration to be binding to the extent that parties are not legally obligated to enter into an agreement after the arbitrator issues a decision.[3153] SBC argues that parties are bound by the arbitrator's decision only if they decide to enter into an agreement. Vanguard responds that SBC's proposal is contrary to the statute, which does not give parties the opportunity to reject the results of arbitration and which does not provide for *de novo* review.[3154]

3. Discussion

1283. After careful review of the record, we are convinced that establishing regulations to carry out our obligations under section 252(e)(5) will provide for an efficient and fair transition from state jurisdiction should we have to assume the responsibility of the state commission under Section 252(e)(5). The rules we establish in this section with respect to arbitration under section 252 apply only to instances where the Commission assumes jurisdiction under section 252(e)(5); we do not purport to advise states on how to conduct arbitration when the Commission has not assumed jurisdiction. The rules we establish will give notice of the procedures and standards the Commission would apply to mediation and arbitration, avoid delay if the Commission had to arbitrate disputes in the near future, and may also offer guidance the states may, at their discretion, wish to consider in implementing their own mediation and arbitration procedures and standards. We decline to adopt national rules governing state arbitration procedures. We believe the states are in a better position to develop mediation and arbitration rules that support the objectives of the 1996 Act. States may develop specific measures that address the concerns of

---

[3149] Sprint reply at 47.

[3150] *Id.*

[3151] *See, e.g.*, Time Warner comments at 111.

[3152] California Commission comments at 50. The California Commission's procedures for resolving interconnection disputes is based on a four-step expedited dispute resolution process for resolving disputes between parties who cannot agree on the terms of interconnection. Step 1 is informal resolution without state intervention. Step 2 provides for dispute resolution with mediation by the Administrative Law Judge (ALJ). Step 3 calls for the parties to submit short pleadings to the ALJ who shall use the state commission's "preferred outcomes" approach as a guideline in resolving dispute. Step 4 allows for a party to challenge an ALJ ruling by filing an expedited complaint.

[3153] SBC comments at 99.

[3154] Vanguard reply at 18-20; *accord* Competition Policy Institute reply at 18-19.

small entities and small incumbent LECs participating in mediation or arbitration.

1284. The rules we adopt herein are minimum, interim procedures. Adopting minimum interim procedures now will allow the Commission to learn from the initial experiences and gain a better understanding of what types of situations may arise that require Commission action. We note that the Commission is not required to adopt procedures and standards for mediation and arbitration within the six-month statutory deadline and that, by adopting minimum interim procedures, the Commission can better direct its resources to more pressing matters that fall within the six-month statutory deadline.

1285. Regarding what constitutes a state's "failure to act to carry out its responsibility under" section 252,[3155] the Commission was presented with numerous options. The Commission will not take an expansive view of what constitutes a state's "failure to act." Instead, the Commission interprets "failure to act" to mean a state's failure to complete its duties in a timely manner. This would limit Commission action to instances where a state commission fails to respond, within a reasonable time, to a request for mediation or arbitration, or fails to complete arbitration within the time limits of section 252(b)(4)(C).[3156] The Commission will place the burden of proof on parties alleging that the state commission has failed to respond to a request for mediation or arbitration within a reasonable time frame. We note the work done by states to date in putting in place procedures and regulations governing arbitration and believe that states will meet their responsibilities and obligations under the 1996 Act.[3157]

1286. We agree with the majority of commenters that argue that our authority to assume the state commission's responsibilities is not triggered when an agreement is "deemed approved" under section 252(e)(4) due to state commission inaction. Section 252(e)(4) provides for automatic approval if a state fails to approve or reject a negotiated or arbitrated agreement within 90 days or 30 days, respectively. Rules of statutory construction require us to give meaning to all provisions and to read provisions consistently, where it is possible to do so. We thus conclude that the most reasonable interpretation is that automatic approval under section 252(e)(4) does not constitute a failure to act.

1287. We also believe that we should establish interim procedures for interested parties to notify the Commission that a state commission has failed to act under section 252. We believe that parties should be required to file a detailed written petition, backed by affidavit, that will, at

---

[3155] 47 U.S.C. § 252(e)(5).

[3156] 47 U.S.C. § 252(b)(4)(C).

[3157] *See, e.g., In the Matter of the Implementation of the Mediation and Arbitration Provisions of the Federal Telecommunications Act of 1996*, Case No. 96-463-TP-UNC, Ohio Commission, (May 30, 1996); *Illinois Commerce Commission On Its Own Motion Adoption of 83 Ill. Adm. Code 761 to Implement the Arbitration Provisions of Section 252 of the Telecommunications Act of 1996*, Docket No. 96-0297, Illinois Commission (June 14, 1996).

the outset, give the Commission a better understanding of the issues involved and the action, or lack of action, taken by the state commission. Allowing less detailed notification increases the likelihood that frivolous requests will be made. With less detailed notification, the Commission's investigations would be broader and more burdensome. A detailed written petition will facilitate a decision about whether the Commission should assume jurisdiction based on section 252(e)(5).

1288. The moving party should submit a petition to the Secretary of the Commission stating with specificity the basis for the petition and any information that supports the claim that the state has failed to act, including, but not limited to the applicable provision(s) of the Act and the factual circumstances which support a finding that a state has failed to act. The moving party must ensure that the applicable state commission and the parties to the proceeding or matter for which preemption is sought are served with the petition on the same date the party serves the petition on the Commission. The petition will serve as notice to parties to the state proceeding and the state commission who will have fifteen days from the date the petition is filed with the Commission to comment. Under section 252(e)(5), the Commission must "issue an order preempting the state commission's jurisdiction of that proceeding or matter" no later than 90 days from the date the petition is filed.[3158] If the Commission takes notice, as section 252(e)(5) permits, that a state commission has failed to act, it will, on its own motion, issue a public notice and provide fifteen days for interested parties to submit comment on whether the Commission should assume responsibility under section 252(e)(5).

1289. If the Commission assumes authority under section 252(e)(5), the Commission must also decide whether it retains authority for that proceeding or matter. We agree with those parties who argue that, once the Commission assumes jurisdiction of a proceeding or matter, it retains authority for that proceeding or matter. For example, if the Commission obtains jurisdiction after a state commission fails to respond to a request for arbitration, the Commission maintains jurisdiction over the arbitration proceeding. Therefore, once the proceeding is before the Commission, any and all further action regarding that proceeding or matter will be before the Commission. We note that there is no provision in the Act for returning jurisdiction to the state commission; moreover, the Commission, with significant knowledge of the issues at hand, would be in the best position efficiently to conclude the matter. Thus, as both a legal and policy matter, we believe that the Commission retains jurisdiction over any matter and proceeding for which it assumes responsibility under Section 252(e)(5).

1290. We reject the suggestion by some parties that, once the Commission has mediated or arbitrated an agreement, the agreement must be submitted to the state commission for approval under state law. We note that section 252(e)(5) provides for the Commission to "assume the responsibility of the State commission under this section with respect to the proceeding or matter

[3158] 47 U.S.C. § 252(e)(5).

and act for the State commission."[3159] This includes acting for the state commission under section 252(e)(1), which calls for state commission approval of "any interconnection agreement adopted by negotiation or arbitration."[3160] We, therefore, do not read section 252(e)(1) or any other provision as calling for state commission approval or rejection of agreements mediated or arbitrated by the Commission. In those instances where a state has failed to act, the Commission acts on behalf of the state and no additional state approval is required.

1291. Requirements set forth in section 252(c) for arbitrated agreements would apply to arbitration conducted by the Commission. We see no reason, and no party has suggested a policy or legal basis, for not applying such standards when the Commission conducts arbitration. Thus, arbitrated agreements must: (1) meet the requirements of section 251, including regulations prescribed by the Commission pursuant to section 251; (2) establish any rates for interconnection, services, or network elements according to section 252(d); and (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.[3161] We reject the suggestion made by some parties that, if the Commission steps into the state commission role, it is bound by state laws and standards that would have applied to the state commission. While states are permitted to establish and enforce other requirements, these are not binding standards for arbitrated agreements under section 252(c). Moreover, the resources and time potentially needed to review adequately and interpret the different laws and standards of each state render this suggestion untenable. Finally, we conclude that it would not make sense to apply to the Commission the timing requirements that section 252(b)(4)(c) imposes on state commissions. The Commission, in some instances, might not even assume jurisdiction until nine months (or more) have lapsed since a section 251 request was initiated.

1292. Based on the comments of the parties, we conclude that a "final offer" method of arbitration, similar to the approach recommended by Vanguard, would best serve the public interest.[3162] Under "final offer" arbitration, each party to the negotiation proposes its best and final offer and the arbitrator determines which of the proposals become binding. The arbitrator would have the option of choosing one of the two proposals in its entirety, or the arbitrator could decide on an issue-by-issue basis. Each final offer must: (1) meet the requirements of section 251, including the Commission's rules thereunder; (2) establish rates for interconnection, services, or network elements according to section 252(d); and (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.[3163] If a final offer submitted by one

[3159] 47 U.S.C. § 252(e)(5).

[3160] 47 U.S.C. § 252(e)(1).

[3161] 47 U.S.C. § 252(c).

[3162] Vanguard comments at 39-40.

[3163] 47 U.S.C. § 252(c).

or more parties fails to comply with these requirements, the arbitrator would have discretion to take steps designed to result in an arbitrated agreement that satisfies the requirements of section 252(c), including requiring parties to submit new final offers within a time frame specified by the arbitrator, or adopting a result not submitted by any party that is consistent with the requirements in section 252(c).

1293. The parties could continue to negotiate an agreement after they submit their proposals and before the arbitrator makes a decision. Under this approach, the Commission will encourage negotiations, with or without the assistance of the arbitrator, to continue after arbitration offers are exchanged. Parties are not precluded from submitting subsequent final offers following such negotiations. We believe that permitting post-offer negotiations will increase the likelihood that the parties will reach consensus on unresolved issues. In addition, permitting post-offer negotiations will increase flexibility and will allow parties to tailor counter-proposals after arbitration offers are exchanged. To provide an opportunity for final post-offer negotiation, the arbitrator will not issue a decision for at least 15 days after submission of the final offers by the parties. In addition, the offers must be consistent with section 251, including the regulations prescribed by the Commission. We reject SBC's suggestion that an arbitrated agreement is not binding on the parties. Absent mutual agreement to different terms, the decision reached through arbitration is binding. We conclude that it would be inconsistent with the 1996 Act to require incumbent LECs to provide interconnection, services, and unbundled elements, impose a duty to negotiate in good faith and a right to arbitration, and then permit incumbent LECs to not be bound by an arbitrated determination. We also believe that, although competing providers do not have an affirmative duty to enter into agreements under section 252, a requesting carrier might face penalties if, by refusing to enter into an arbitrated agreement, that carrier is deemed to have failed to negotiate in good faith.[3164] Such penalties should serve as a disincentive for requesting carriers to force an incumbent LEC to expand resources in arbitration if the requesting carrier does not intend to abide by the arbitrated decision.

1294. Adopting a "final offer" method of arbitration and encouraging negotiations to continue allows us to maintain the benefits of final offer arbitration, giving parties an incentive to submit realistic "final offers," while providing additional flexibility for the parties to agree to a resolution that best serves their interests. To the extent that these procedures encourage parties to negotiate voluntarily rather than arbitrate, such negotiated agreements will be subject to review pursuant to section 252(e)(2)(A), which would allow the Commission to reject agreements if they are inconsistent with the public interest. This approach also addresses the argument that under "final offer" arbitration neither offer might best serve the public interest, because it allows the parties to obtain feedback from the arbitrator on public interest matters.

1295. We believe that the arbitration proceedings generally should be limited to the requesting carrier and the incumbent local exchange provider. This will allow for a more

[3164] *See* 47 U.S.C. § 252(b)(5) (requiring parties to negotiate in good faith in the course of arbitration).

efficient process and minimize the amount of time needed to resolve disputed issues. We believe that opening the process to all third parties would be unwieldy and would delay the process. We will, however, consider requests by third parties to submit written pleadings. This may, in some instances, allow interested parties to identify important public policy issues not raised by parties to an arbitration.

B. Requirements of Section 252(i)

1. Background

1296. Section 251 requires that interconnection, unbundled element, and collocation rates be "nondiscriminatory" and prohibits the imposition of "discriminatory conditions" on the resale of telecommunications services.[3165] Section 252(i) of the 1996 Act provides that a "local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under [section 252] to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement."[3166] In the NPRM, we expressed the view that section 252(i) appears to be a primary tool of the 1996 Act for preventing discrimination under section 251, and we sought comment on whether we should adopt national standards for resolving disputes under section 252(i) in the event that we must assume the state's responsibilities pursuant to section 252(e)(5). In addition, because we may need to interpret section 252(i) if we assume the state commission's responsibilities, we sought comment on the meaning of section 252(i).

1297. We also sought comment in the NPRM on whether section 252(i) requires that only similarly-situated carriers may enforce against incumbent LECs provisions of agreements filed with state commissions, and, if so, how "similarly-situated carrier" should be defined. In particular, we asked whether section 252(i) requires that the same rates for interconnection must be offered to all requesting carriers regardless of the cost of serving that carrier, or whether it would be consistent with the statute to permit different rates if the costs of serving carriers are different. We also asked whether the section can be interpreted to allow incumbent LECs to make available interconnection, services, or network elements only to requesting carriers serving a comparable class of subscribers or providing the same service (*i.e.*, local, access, or interexchange) as the original parties to the agreement. In the NPRM, we tentatively concluded that the language of the statute appears to preclude such differential treatment among carriers.

[3165] 47 U.S.C. §§ 251(c)(2)(D) (interconnection rates, terms, and conditions); 251(c)(3) (unbundled network elements rates, terms, and conditions); 251(c)(6) (collocation rates, terms, and conditions); and 251(c)(4)(B) (resale). Section 252(d)(1) also requires nondiscriminatory interconnection and network element charges. 47 U.S.C. § 252(d)(1).

[3166] 47 U.S.C. § 252(i).

1298. Additionally, we sought comment in the NPRM on whether section 252(i) permits requesting telecommunications carriers to choose among individual provisions of publicly-filed interconnection agreements or whether they must subscribe to an entire agreement. We also sought comment regarding what time period an agreement must remain available for use by other requesting telecommunications carriers.

2. Comments

1299. Two state commissions and SBC believe that implementation of section 252(i) should be left to the states,[3167] while Time Warner favors national standards.[3168] CompTel argues that we should adopt expedited procedures whereby carriers may complain to the Commission when incumbent LECs refuse to make agreements available to them in alleged violation of section 252(i).[3169]

1300. New entrants generally support the view that section 252(i) does not require that requesting carriers seeking to avail themselves of a prior negotiated or arbitrated agreement be "similarly situated" with respect to the original party who negotiated the agreement.[3170] They argue that such a limitation would be contrary to Congress's intent,[3171] or that it could invite perpetual dispute over which carriers are similarly situated and what cost differences are real and material.[3172] Winstar questions whether states could implement a "similarly situated" carrier requirement without unintentionally creating a vehicle for incumbent LECs to discriminate against competitive entrants.[3173] LDDS specifically agrees with the NPRM's tentative conclusion that section 252(i) prohibits incumbent LECs from limiting the availability of agreements to a carrier based on the class of customers the carrier serves or the type of service it provides.[3174] The

---

[3167] Pennsylvania Commission comments at 43; Louisiana Commission comments at 28-29; SBC Comments at 24.

[3168] Time Warner comments at 112.

[3169] CompTel comments at 107.

[3170] WinStar comments at 18-19; CompTel comments at 106; LDDS comments at 88; Time Warner comments at 113; ACSI reply at 23-24; Telecommunications Resellers Ass'n comments at 50.

[3171] CompTel comments at 106; LDDS comments at 88; Time Warner comments at 113. CompTel also asserts that, subject to cost-based deviations, no carrier should pay more than any other carrier when it purchases the same service or facility from the same incumbent LEC, nor should agreements include language regarding the nature of the carrier who may subsequently enter into the same agreements. CompTel comments at 106.

[3172] Telecommunications Resellers Ass'n comments at 50-51.

[3173] WinStar comments at 18-19.

[3174] LDDS comments at 88.

Telecommunications Resellers Ass'n believes section 252(i) prohibits discrimination on the basis of the cost of serving a carrier, and claims its members have been, and continue to be, denied preferred service offerings and price points in the interexchange market under the guise of a "similarly situated" criterion.[3175]

1301. WinStar suggests we assign to the incumbent LEC a heavy burden of proving that a new carrier is substantially different from the original parties to an agreement, and that we require the incumbent LEC to provide service to the new entrant according to the individual terms of an agreement while the dispute is pending. WinStar asserts that, absent such requirements, the incumbent LEC could use alleged technological differences to create barriers to entry.[3176]

1302. GTE, PacTel, USTA, BellSouth, and the Ohio Consumers' Counsel believe the statute contemplates drawing distinctions between carriers,[3177] such as, for instance, where the incumbent LEC faces different costs in serving different carriers.[3178] According to GTE and PacTel, carriers must be "similarly situated" because the subsequent carrier's technical requirements may be incompatible with the incumbent LEC's network.[3179] GTE asserts that providing service under an agreement to carriers that are not similarly situated with respect to the technical feasibility and costs of interconnection and transport and termination would be inconsistent with the 1996 Act's requirements that interconnection be technically feasible and offered at cost-based rates.[3180]

1303. Incumbent LECs also generally oppose the view that section 252(i) permits competitive carriers to choose among provisions in a publicly-filed interconnection agreement.[3181] For instance, BellSouth contends that the text of section 252(i) supports its view, and that the legislative history reference cited in the NPRM casts no light on Congress' intent because the

---

[3175] Telecommunications Resellers Ass'n comments at 50-51.

[3176] WinStar comments at 19 n.14. WinStar further suggests that the LEC should be required to adjust the arrangement to account for differences in technology employed by the new entrant, without revising material terms of the arrangement. *Id.*

[3177] GTE comments at 82-83; PacTel comments at 101; USTA comments at 95-96; BellSouth comments at 80-81; Ohio Consumers' Counsel comments at 51.

[3178] GTE comments at 82-83; Municipal Utilities comments at 14; USTA comments at 96.

[3179] GTE comments at 82-83; PacTel comments at 101.

[3180] GTE comments at 83.

[3181] *See, e.g.*, Ameritech comments at 98-99; BellSouth comments at 81; Bay Springs *et al* comments at 19; GTE comments at 83; SBC comments at 24; USTA comments at 96-97.

House did not recede to the Senate's language.[3182] GTE urges the Commission to treat the availability of agreements under section 252(i) the same way it treats AT&T Tariff 12 and Contract Tariff offerings.[3183] Ameritech, GTE and SBC also contend that section 252(i)'s requirement that a requesting carrier take service upon the same terms and conditions as the original carrier precludes unbundled availability.[3184] USTA argues unbundled availability of agreement provisions will skew the individualized nature of negotiations, magnify the importance of each individual term of an agreement, and encourage incumbent LECs to offer only standardized, relatively high-cost packages.[3185]

1304. New entrants, joined by the Ohio Commission, support the view that the statute makes individual provisions of agreements available to carriers.[3186] They argue that this comports with the statutory language and legislative history,[3187] and that requiring requesting carriers to take an entire agreement will cause delay[3188] and foster discrimination by enabling incumbent LECs to fashion agreements so that no subsequent carrier may benefit from them.[3189] MCI argues that, although this approach may make incumbents less likely to compromise, the effect on negotiations will be small.[3190] The SBA asserts allowing entrants to utilize individual provisions of agreements will lead to increased competition, which, in turn, will drive prices towards the most economically efficient levels, and that these benefits outweigh any additional burden that

---

[3182] BellSouth comments at 81.

[3183] GTE comments at 83; *see also* BellSouth comments at 81; USTA comments at 97.

[3184] Ameritech comments at 99; GTE comments at 83; SBC comments at 24.

[3185] USTA comments at 96.

[3186] *See, e.g.*, ALTS comments at 54-55; LDDS comments at 89; Jones Intercable comments at 36; Sprint reply at 48; CompTel reply at 45; AT&T comments at 89-90; NEXTLINK comments at 36-37; MFS comments at 90-91; Time Warner reply at 45-46; Telecommunications Resellers Ass'n comments at 51; Ohio Commission comments at 84. Teleport argues that, if the FCC does not adopt its "preferred outcomes" paradigm for negotiations, it should allow carriers to pick and choose among provisions, asserting that without the ability to pick and choose among provisions, unequal bargaining conditions between LECs and competitive LECs will make meaningful negotiations impossible. Teleport comments at 54-55.

[3187] WinStar comments at 17-18; MCI comments at 96; Jones Intercable comments at 36; SBA comments at 17; Time Warner reply at 46.

[3188] WinStar comments at 18.

[3189] *See, e.g.*, Telecommunications Resellers Ass'n comments at 51; Sprint reply at 48; AT&T comments at 90 n.139; MFS comments at 90-91.

[3190] MCI comments at 96.

such unbundling may place upon incumbents in negotiating agreements.[3191] SBA further argues that failure to permit unbundling of agreements would deter entry by smaller competitors that are unable or unwilling to pay for all of the elements contained in a an agreement negotiated by a larger competitor.[3192] CompTel asks that we rule that an incumbent LEC may not insist upon the observance of any term or condition that is not reasonable in the context of the requesting carrier.[3193]

1305. ALTS suggests that we permit unbundled availability to the level of the individual paragraphs and sections of section 251, with the exception of network elements provided pursuant to section 251(c)(3), which ALTS believes should be provided individually to non-parties on a disaggregated basis.[3194] ALTS argues such a rule would reduce concern that unbundled availability would slow the negotiation process by magnifying the importance of individual terms.[3195] Jones Intercable requests that we clarify that the statute permits so-called "most favored nation" provisions, which allow a new entrant with an interconnection agreement in place with an incumbent LEC to modify such an agreement to substitute the preferable terms included in a later agreement that the incumbent LEC enters with a subsequent new entrant.[3196]

1306. Parties' suggestions for the length of time agreements should remain on file pursuant to section 252(i) range from a reasonable period,[3197] until changes in the network adopted for independent reasons make it no longer feasible to provide interconnection under an agreement,[3198] to as long as the agreement remains in operation.[3199] Out of concern that incumbent LECs might force competitors to renegotiate agreements at unreasonably short

---

[3191] SBA comments at 18.

[3192] SBA comments at 16-17; *see also* R. Koch comments at 3.

[3193] CompTel comments at 107.

[3194] ALTS comments at 54-55.

[3195] *Id.*

[3196] Jones Intercable comments at 36.

[3197] BellSouth comments at 81-82. GTE suggested agreements remain publicly available for a reasonable period, as Commission requires for AT&T's Tariff 12. GTE comments at 83.

[3198] MCI comments at 97.

[3199] Telecommunications Resellers Ass'n comments at 51-52; Time Warner comments at 114; Lincoln Tel. comments at 25-26.

intervals, the SBA argues that there should be no arbitrary limit on the duration of agreements.[3200]

1307. Several new entrants also raise issues concerning the filing of agreements pursuant to section 252(i). Jones Intercable urges us to require that incumbent LECs file copies of all negotiated agreements at the FCC, as well as at state commissions.[3201]

1308. AT&T and the Telecommunications Resellers Ass'n believe section 252(i) requires that interconnection agreements negotiated prior to enactment of the 1996 Act be available for use by requesting telecommunications carriers,[3202] while F. Williamson opposes this view.[3203] MFS, NCTA and WinStar urge us to find that section 252(i) applies to interconnection agreements between adjacent, non-competing LECs.[3204] BellSouth is opposed.[3205]

3. Discussion

1309. We conclude that it will assist the carriers in determining their respective obligations, facilitate the development of a single, uniform legal interpretation of the Act's requirements and promote a procompetitive, national policy framework to adopt national standards to implement section 252(i). Issues such as whether section 252(i) allows requesting telecommunications carriers to choose among provisions of prior interconnection agreements or requires them to accept an entire agreement are issues of law that should not vary from state to state and are also central to the statutory scheme and to the emergence of competition. National standards will help state commissions and parties to expedite the resolution of disputes under section 252(i).

1310. We conclude that the text of section 252(i) supports requesting carriers' ability to choose among individual provisions contained in publicly filed interconnection agreements. As we note above, section 252(i) provides that a "local exchange carrier shall make available any

---

[3200] SBA comments at 18.

[3201] Jones Intercable comments at 20.

[3202] AT&T comments at 89; Telecommunications Resellers Ass'n comments at 52.

[3203] F. Williamson comments at 5 (arguing that nothing in the 1996 Act requires that existing agreements be submitted or resubmitted to a state commission for approval). F. Williamson further comments that the statute does not permit one party to an existing agreement compel renegotiation (and/or arbitration) under the procedures in section 252. *Id.*

[3204] MFS comments at 86; NCTA reply at 13; WinStar reply at 19.

[3205] BellSouth comments at 64; *see also* Rural Tel. Coalition comments at 15-16 (asserting sections 251-252 do not apply to agreements between adjacent, non-competing carriers).

interconnection, service, or network element provided under an agreement . . . to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement."[3206] Thus, Congress drew a distinction between "any interconnection, service, or network element[s] provided under an agreement," which the statute lists individually, and agreements in their totality. Requiring requesting carriers to elect entire agreements, instead of the provisions relating to specific elements, would render as mere surplusage the words "any interconnection, service, or network element."

1311. We disagree with BellSouth regarding the significance of the legislative history quoted in the NPRM. The Conference Committee amended section 251(g), S. 652's predecessor to section 252(i), and changed "service, facility, or function" to "interconnection, service, or element." The House of Representatives' bill did not contain a version of section 252(i).[3207] We find that section 252(i)'s language does not differ substantively from the text of the Senate bill's section 251(g). The Senate Commerce Committee stated its provision, section 251(g), was intended to "make interconnection more efficient by making available to other carriers the individual elements of agreements that have been previously negotiated."[3208]

1312. We also find that practical concerns support our interpretation. As observed by AT&T and others, failure to make provisions available on an unbundled basis could encourage an incumbent LEC to insert into its agreement onerous terms for a service or element that the original carrier does not need, in order to discourage subsequent carriers from making a request under that agreement. In addition, we observe that different new entrants face differing technical constraints and costs. Since few new entrants would be willing to elect an entire agreement that would not reflect their costs and the specific technical characteristics of their networks or would not be consistent with their business plans, requiring requesting carriers to elect an entire agreement would appear to eviscerate the obligation Congress imposed in section 252(i).

1313. We also choose this interpretation despite concerns voiced by some incumbent LECs that allowing carriers to choose among provisions will harm the public interest by slowing down the process of reaching interconnection agreements by making incumbent LECs less likely to compromise. In reaching this conclusion, we observe that new entrants, who stand to lose the most if negotiations are delayed, generally do not argue that concern over slow negotiations would outweigh the benefits they would derive from being able to choose among terms of publicly filed agreements. Unbundled access to agreement provisions will enable smaller carriers

---

[3206] 47 U.S.C. § 252(i).

[3207] Although H.R. 1555's section 244(d) contained similar ideas, its language and structure are sufficiently different from that of section 252(i) that we do not consider section 244(d) to be a prior version of section 252(i).

[3208] *Report of the Committee on Commerce, Science, and Transportation on S. 652*, S. Rpt. 104-23, 104th Cong., 1st Sess. (1995) at 21-22.

who lack bargaining power to obtain favorable terms and conditions -- including rates -- negotiated by large IXCs, and speed the emergence of robust competition.[3209]

1314. We conclude that incumbent LECs must permit third parties to obtain access under section 252(i) to any individual interconnection, service, or network element arrangement on the same terms and conditions as those contained in any agreement approved under section 252. We find that this level of disaggregation is mandated by section 252(a)(1), which requires that agreements shall include "charges for interconnection and each service or network element included in the agreement," and section 251(c)(3), which requires incumbent LECs to provide "non-discriminatory access to network elements on an unbundled basis." In practical terms, this means that a carrier may obtain access to individual elements such as unbundled loops at the same rates, terms, and conditions as contained in any approved agreement. We agree with ALTS that such a view comports with the statute, and lessens the concerns of carriers that argue that unbundled availability will delay negotiations.

1315. We reject GTE's argument that section 252(i)'s statement, that requesting carriers must receive individual elements "upon the same terms and conditions" as those contained in the agreement, precludes unbundled availability of individual elements. GTE's argument fails to give meaning to Congress's distinction between agreements and elements, and ignores the 1996 Act's prime goals of nondiscriminatory treatment of carriers and promotion of competition. Instead, we conclude that the "same terms and conditions" that an incumbent LEC may insist upon shall relate solely to the individual interconnection, service, or element being requested under section 252(i). For instance, where an incumbent LEC and a new entrant have agreed upon a rate contained in a five-year agreement, section 252(i) does not necessarily entitle a third party to receive the same rate for a three-year commitment. Similarly, that one carrier has negotiated a volume discount on loops does not automatically entitle a third party to obtain the same rate for a smaller amount of loops. Given the primary purpose of section 252(i) of preventing discrimination, we require incumbent LECs seeking to require a third party agree to certain terms and conditions to exercise its rights under section 252(i) to prove to the state commission that the terms and conditions were legitimately related to the purchase of the individual element being sought. By contrast, incumbent LECs may not require as a "same" term or condition the new entrant's agreement to terms and conditions relating to other interconnection, services, or elements in the approved agreement. Moreover, incumbent LEC efforts to restrict availability of interconnection, services, or elements under section 252(i) also must comply with the 1996 Act's general nondiscrimination provisions. *See* Section VII.d.3.

1316. We further conclude that section 252(i) entitles all parties with interconnection agreements to "most favored nation" status regardless of whether they include "most favored nation" clauses in their agreements. Congress's command under section 252(i) was that parties may utilize any individual interconnection, service, or element in publicly filed interconnection

[3209] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

agreements and incorporate it into the terms of their interconnection agreement. This means that any requesting carrier may avail itself of more advantageous terms and conditions subsequently negotiated by any other carrier for the same individual interconnection, service, or element once the subsequent agreement is filed with, and approved by, the state commission. We believe the approach we adopt will maximize competition by ensuring that carriers' obtain access to terms and elements on a nondiscriminatory basis.

1317. We find that section 252(i) permits differential treatment based on the LEC's cost of serving a carrier. We further observe that section 252(d)(1) requires that unbundled element rates be cost-based, and sections 251(c)(2) and (c)(3) require incumbent LECs to provide only technically-feasible forms of interconnection and access to unbundled elements, while section 252(i) mandates that the availability of publicly-filed agreements be limited to carriers willing to accept the same terms and conditions as the carrier who negotiated the original agreement with the incumbent LEC. We conclude that these provisions, read together, require that publicly-filed agreements be made available only to carriers who cause the incumbent LEC to incur no greater costs than the carrier who originally negotiated the agreement, so as to result in an interconnection arrangement that is both cost-based and technically feasible. However, as discussed in Section VII regarding discrimination, where an incumbent LEC proposes to treat one carrier differently than another, the incumbent LEC must prove to the state commission that that differential treatment is justified based on the cost to the LEC of providing that element to the carrier.

1318. We conclude, however, that section 252(i) does not permit LECs to limit the availability of any individual interconnection, service, or network element only to those requesting carriers serving a comparable class of subscribers or providing the same service (*i.e.*, local, access, or interexchange) as the original party to the agreement. In our view, the class of customers, or the type of service provided by a carrier, does not necessarily bear a direct relationship with the costs incurred by the LEC to interconnect with that carrier or on whether interconnection is technically feasible. Accordingly, we conclude that an interpretation of section 252(i) that attempts to limit availability by class of customer served or type of service provided would be at odds with the language and structure of the statute, which contains no such limitation.

1319. We agree with those commenters who suggest that agreements remain available for use by requesting carriers for a reasonable amount of time. Such a rule addresses incumbent LEC concerns over technical incompatibility, while at the same time providing requesting carriers with a reasonable time during which they may benefit from previously negotiated agreements. In addition, this approach makes economic sense, since the pricing and network configuration choices are likely to change over time, as several commenters have observed. Given this reality, it would not make sense to permit a subsequent carrier to impose an agreement or term upon an incumbent LEC if the technical requirements of implementing that agreement or term have changed.

1320. We observe that section 252(h) expressly provides that state commissions maintain for public inspection copies of interconnection agreements approved under section 252(e). We therefore decline Jones Intercable's suggestion that we require carriers to file agreements at the FCC, in addition to section 252(h)'s filing requirement. However, when the Commission performs the state's responsibilities under section 252(e)(5), parties must file their agreements with the Commission, as well as with the state commission.[3210]

1321. We further conclude that a carrier seeking interconnection, network elements, or services pursuant to section 252(i) need not make such requests pursuant to the procedures for initial section 251 requests, but shall be permitted to obtain its statutory rights on an expedited basis. We find that this interpretation furthers Congress's stated goals of opening up local markets to competition and permitting interconnection on just, reasonable, and nondiscriminatory terms, and that we should adopt measures that ensure competition occurs as quickly and efficiently as possible. We conclude that the nondiscriminatory, pro-competition purpose of section 252(i) would be defeated were requesting carriers required to undergo a lengthy negotiation and approval process pursuant to section 251 before being able to utilize the terms of a previously approved agreement. Since agreements shall necessarily be filed with the states pursuant to section 252(h), we leave to state commissions in the first instance the details of the procedures for making agreements available to requesting carriers on an expedited basis. Because of the importance of section 252(i) in preventing discrimination, however, we conclude that carriers seeking remedies for alleged violations of section 252(i) shall be permitted to obtain expedited relief at the Commission, including the resolution of complaints under section 208 of the Communications Act, in addition to their state remedies.

1322. We conclude as well that agreements negotiated prior to enactment of the 1996 Act must be available for use by subsequent, requesting carriers. Section 252(i) must be read in conjunction with section 252(a)(1), which clearly states that "agreement" for purposes of section 252, "includ[es] any interconnection agreement negotiated before the date of enactment . . . ."[3211] We conclude that this language demonstrates that Congress intended 252(i) to apply to agreements negotiated prior to enactment of the 1996 Act and approved by the state commission pursuant to section 252(e), as well as those approved under the section 251/252 negotiation process. Accordingly, we find that agreements negotiated prior to enactment of the 1996 Act must be disclosed publicly, and be made available to requesting telecommunications carriers pursuant to section 252(i).

1323. We also find that section 252(i) applies to interconnection agreements between adjacent, incumbent LECs. We note that section 252(i) requires a local exchange carrier to make

---

[3210] We note section 22.903(d) of our rules, which remains in effect, requires the BOCs to file with us their interconnection agreements with their affiliated cellular providers. 47 C.F.R. § 22.903(d).

[3211] 47 U.S.C. § 252(a)(1).

available to requesting telecommunications carriers "any interconnection service, or network element *provided under an agreement approved under this section* . . . ."[3212] The plain meaning of this section is that any interconnection agreement approved by a state commission, including one between adjacent LECs, must be made available to requesting carriers pursuant to section 252(i). Requiring availability of such agreements will provide new entrants with a realistic benchmark upon which to base negotiations, and this will further the Congressional purpose of increasing competition. As stated in Section III of this Order, adjacent, incumbent LECs will be given an opportunity to renegotiate such agreements before they become subject to section 252(i)'s requirements. In Section III, we also consider, and reject, the Rural Tel. Coalition's argument that making agreements between adjacent, non-competing LECs available under section 252 will have a detrimental effect on small, rural carriers. *See* Section III, *supra*.

[3212] 47 U.S.C. § 252(i) (emphasis supplied).

XV. FINAL REGULATORY FLEXIBILITY ANALYSIS

1324. As required by Section 603 of the Regulatory Flexibility Act (RFA), 5 U.S.C. § 603, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the NPRM. The Commission sought written public comment on the proposals in the NPRM. The Commission's Final Regulatory Flexibility Analysis (FRFA) in this Order conforms to the RFA, as amended by the Contract With America Advancement Act of 1996 (CWAAA), Pub. L. No. 104-121, 110 Stat. 847 (1996).[3213]

A. Need for and Objectives of this Report and Order and the Rules Adopted Herein

1325. The Commission, in compliance with section 251(d)(1) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the 1996 Act), promulgates the rules in this Order to ensure the prompt implementation of sections 251 and 252 of the 1996 Act, which are the local competition provisions. Congress sought to establish through the 1996 Act "a pro-competitive, de-regulatory national policy framework" for the United States telecommunications industry.[3214] Three principal goals of the telephony provisions of the 1996 Act are: (1) opening local exchange and exchange access markets to competition; (2) promoting increased competition in telecommunications markets that are already open to competition, particularly long distance services markets; and, (3) reforming our system of universal service so that universal service is preserved and advanced as local exchange and exchange access markets move from monopoly to competition.

1326. The rules adopted in this Order implement the first of these goals -- opening local exchange and exchange access markets to competition. The objective of the rules adopted in this Order is to implement as quickly and effectively as possible the national telecommunications policies embodied in the 1996 Act and to promote the development of competitive, deregulated markets envisioned by Congress.[3215] In doing so, we are mindful of the balance that Congress struck between this goal of bringing the benefits of competition to all consumers and its concern for the impact of the 1996 Act on small incumbent local exchange carriers, particularly rural carriers, as evidenced in section 251(f) of the 1996 Act.

[3213] Subtitle II of the CWAAA is "The Small Business Regulatory Enforcement Fairness Act of 1996" (SBREFA), codified at 5 U.S.C. § 601 *et seq.*

[3214] S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 1 (1996).

[3215] *Id.*

B. Analysis of Significant Issues Raised in Response to the IRFA

1327. *Summary of the Initial Regulatory Flexibility Analysis (IRFA).* In the NPRM, the Commission performed an IRFA.[3216] In the IRFA, the Commission found that the rules it proposed to adopt in this proceeding may have a significant impact on a substantial number of small business as defined by section 601(3) of the RFA. The Commission stated that its regulatory flexibility analysis was inapplicable to incumbent LECs because such entities are dominant in their field of operation. The Commission noted, however, that it would take appropriate steps to ensure that the special circumstances of smaller incumbent LECs are carefully considered in our rulemaking. The Commission also found that the proposed rules may overlap or conflict with the Commission's Part 69 access charge and *Expanded Interconnection* rules. Finally, the IRFA solicited comment on alternatives to our proposed rules that would minimize the impact on small entities consistent with the objectives of this proceeding.

1. Treatment of Small LECs

1328. *Comments.* The Small Business Administration (SBA), the Rural Telephone Coalition (Rural Tel. Coalition), and CompTel maintain that the Commission violated the RFA when it failed to include small incumbent LECs in its IRFA without first consulting SBA to establish a definition of "small business."[3217] Rural Tel. Coalition and CompTel also argue that the Commission failed to explain its statement that "incumbent LECs are dominant in their field of operation" or how that finding was reached.[3218] Rural Tel. Coalition states that such an analysis of the market power of incumbent LECs is necessary because incumbent LECs are now facing competition from a variety of sources, including wireline and wireless carriers. Rural Tel. Coalition recommends that the Commission abandon its determination that all incumbent LECs are dominant, and perform regulatory flexibility analysis for incumbent LECs having fewer than 1500 employees.[3219]

1329. *Discussion.* In essence, SBA and Rural Tel. Coalition argue that we exceeded our authority under the RFA by certifying all incumbent LECs as dominant in their field of operation, and concluding on that basis that they are not small businesses under the RFA. SBA and Rural Tel. Coalition contend that the authority to make a size determination rests solely with SBA and that, by excluding a group (small incumbent LECs) from coverage under the RFA, the

---

[3216] NPRM at paras. 274-287.

[3217] SBA RFA comments at 3-5; Rural Tel. Coalition reply at 38-39; CompTel reply at 46.

[3218] Rural Tel. Coalition reply at 39; CompTel reply at 46.

[3219] Rural Tel. Coalition reply at 40.

Commission made an unauthorized size determination.[3220] Neither SBA nor Rural Tel. Coalition cites any specific authority for this latter proposition.

1330. We have found incumbent LECs to be "dominant in their field of operation" since the early 1980's, and we consistently have certified under the RFA[3221] that incumbent LECs are not subject to regulatory flexibility analyses because they are not small businesses.[3222] We have made similar determinations in other areas.[3223] We recognize SBA's special role and expertise with regard to the RFA, and intend to continue to consult with SBA outside the context of this proceeding to ensure that the Commission is fully implementing the RFA. Although we are not fully persuaded on the basis of this record that our prior practice has been incorrect, in light of the special concerns raised by SBA and Rural Tel. Coalition in this proceeding, we will, nevertheless, include small incumbent LECs in this FRFA to remove any possible issue of RFA compliance. We, therefore, need not address Rural Tel. Coalition's arguments that incumbent LECs are not dominant.[3224]

2. Other Issues

1331. *Comments.* Parties raised several other issues in response to the Commission's IRFA in the NPRM. SBA and CompTel contend that commenters should not be required to separate their comments on the IRFA from their comments on the other issues raised in the NPRM.[3225] SBA maintains that separating RFA comments and discussion from the rest of the comments "isolates" the regulatory flexibility analysis from the remainder of the discussion, thereby handicapping the Commission's analysis of the impact of the proposed rules on small businesses.[3226] SBA further suggests that our IRFA failed to: (1) give an adequate description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rules,

---

[3220] SBA RFA comments at 4-5 (citing 15 U.S.C. §632(a)(2)); Rural Tel. Coalition reply at 38.

[3221] *See* 5 U.S.C. § 605(b).

[3222] *See, e.g., Expanded Interconnection with Local Telephone Company Facilities*, Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 5809 (1991); *MTS and WATS Market Structure*, Report and Order, 2 FCC Rcd 2953, 2959 (1987) (citing *MTS and WATS Market Structure*, Third Report and Order, 93 F.C.C.2d 241, 338-39 (1983)).

[3223] *See, e.g., In the Matter of Implementation of Sections of the Cable Television Consumer Protection Act of 1992: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7418 (1995).

[3224] Rural Tel. Coalition reply at 39-40.

[3225] SBA RFA comments at 2-3, CompTel reply at 46.

[3226] *Id.*

including an estimate of the classes of small entities that will be subject to the requirement and the professional skills necessary to prepare such reports or records;[3227] and (2) describe significant alternatives that minimize the significant economic impact of the proposal on small entities, including exemption from coverage of the rule.[3228] SBA also asserts that none of the alternatives in the NPRM is designed to minimize the impact of the proposed rules on small businesses.

1332. The Idaho Commission argues that the Commission's rules will be devised for large carriers and therefore will be "de facto burdensome" to Idaho's incumbent LECs and probably to potential new entrants, which may be small companies.[3229] Therefore, Idaho requests that state commissions be permitted flexibility to address the impacts of our rules on smaller incumbent LECs.

1333. The Small Cable Business Association (SCBA) contends that the Commission's IRFA is inadequate because it does not state that small cable companies are among the small entities affected by the proposed rules.[3230] In its comments on the IRFA, SCBA refers to its proposal that the Commission establish the following national standards for small cable companies: (1) the definition of "good faith" negotiation; (2) the development of less burdensome arbitration procedures for interconnection and resale; (3) the designation of a small company contact person at incumbent LECs and state commissions; and (4) the application of section 251(f) of the 1996 Act.[3231]

1334. *Discussion.* We disagree with SBA's assessment of our IRFA. Although the IRFA referred only generally to the reporting and recordkeeping requirements imposed on incumbent LECs, our Federal Register notice set forth in detail the general reporting and recordkeeping requirements as part of our Paperwork Reduction Act statement.[3232] The IRFA also sought comment on the many alternatives discussed in the body of the NPRM, including the statutory exemption for certain rural telephone companies.[3233] The numerous general public comments concerning the impact of our proposal on small entities in response to the NPRM, including

---

[3227] SBA RFA comments at 5-6, *citing* 5 U.S.C. § 603(b)(4).

[3228] SBA RFA comments at 7-8, *citing* 5 U.S.C. § 603(c).

[3229] Idaho Commission comments at 15.

[3230] SCBA RFA comments at 1.

[3231] *Id.* at 1-2.

[3232] NPRM, at para. 283 (rel. Apr. 19, 1996), *summarized at* 61 Fed. Reg. 18311, 18312 (Apr. 25, 1996).

[3233] 47 U.S.C. § 251(f).

comments filed directly in response to the IRFA,[3234] enabled us to prepare this FRFA. Thus, we conclude that the IRFA was sufficiently detailed to enable parties to comment meaningfully on the proposed rules and, thus, for us to prepare this FRFA. We have been working with, and will continue to work with SBA, to ensure that both our IRFAs and FRFAs fully meet the requirements of the RFA.

1335. SBA also objects to the NPRM's requirement that responses to the IRFA be filed under a separate and distinct heading, and proposes that we integrate RFA comments into the body of general comments on a rule.[3235] Almost since the adoption of the RFA, we have requested that IRFA comments be submitted under a separate and distinct heading.[3236] Neither the RFA nor SBA's rules prescribe the manner in which comments may be submitted in response to an IRFA[3237] and, in such circumstances, it is well established that an administrative agency can structure its proceedings in any manner that it concludes will enable it to fulfill its statutory duties.[3238] Based on our past practice, we find that separation of comments responsive to the IRFA facilitates our preparation of a compulsory summary of such comments and our responses to them, as required by the RFA. Comments on the impact of our proposed rules on small entities have been integrated into our analysis and consideration of the final rules. We, therefore, reject SBA's argument that we improperly required commenters to include their comments on the IRFA in a separate section.

1336. We also reject SBA's assertion that none of the alternatives in the NPRM is designed to minimize the impact of the proposed rules on small businesses. For example, we proposed that incumbent LECs be required to offer competitors access to unbundled local loop, switching, and transport facilities.[3239] These proposals permit potential competitors to enter the market by relying, in part or entirely, on the incumbent LEC's facilities. Reduced economic entry barriers are designed to provide reasonable opportunities for new entrants, particularly small entities, to enter the market by minimizing the initial investment needed to begin providing service. In addition, we believe section 251(f) and our rules provide states with significant

---

[3234] SBA RFA comments; Rural Tel. Coalition reply at 38-41; Idaho Commission comments at 15; SCBA RFA comments; CompTel reply at 45-46.

[3235] SBA RFA comments at 2.

[3236] *See, e.g., Inquiry into the Development of Regulatory Policy in Regard to Direct Broadcast Satellites*, Notice of Proposed Policy Statement and Rulemaking, 86 F.C.C.2d 719, 755 (1981).

[3237] *See* 5 U.S.C. § 603 (IRFA requirements).

[3238] *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524-25 (1978), *citing FCC v. Schreiber*, 381 U.S. 279, 290 (1965) and *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940).

[3239] NPRM paras. 94-97.

flexibility to "deal with the needs of individual companies in light of public interest concerns." as requested by the Idaho Commission. With regard to the potential burdens on small entities other than incumbent LECs, we believe our rules permit states to structure arbitration procedures, for example, in ways that minimize filing or other burdens on new entrants that are small entities.

1337. We also disagree with SCBA's assertion that the IRFA was deficient because it did not identify small cable operators as entities that would be affected by the proposed rules. The IRFA in the NPRM states: "Insofar as the proposals in this Notice apply to telecommunications carriers other than incumbent LECs (generally interexchange carriers and new LEC entrants), they may have a significant impact on a substantial number of small entities."[3240] The phrase "new LEC entrants" clearly encompasses small cable operators that become providers of local exchange service. The NPRM even identifies cable operators as potential new entrants.[3241]

1338. We agree with SCBA's argument that the Commission should identify certain minimum standards to provide guidance on the requirement that parties negotiate in good faith.[3242] As discussed in Section III.B, we conclude that we should establish minimum standards that will offer parties guidance in determining whether they are acting in good faith. We believe that these minimum standards address SCBA's assertion that federal guidelines for good faith negotiations may be particularly important for small entities because unreasonable delays in negotiations could represent an entry barrier for small entities.

1339. We also agree with SCBA's recommendation that we should establish guidelines for the application of section 251(f) regarding exemptions, suspensions, and modifications of our rules governing interconnection with rural carriers. As discussed in section XII.B, we find that a rural incumbent LEC should not be able to obtain an exemption, suspension, or modification of its obligations under section 251 unless it offers evidence that the application of those requirements would be likely to cause injury beyond the financial harm typically associated with efficient competitive entry. We are also persuaded by the suggestion of SCBA and others that incumbent LECs should bear the burden of showing that they should be exempt pursuant to section 251(f)(1) from national interconnection requirements. We believe that this finding is consistent with the pro-competitive goals of the 1996 Act and our determination in Section XII that Congress did not intend to withhold from consumers the benefits of local telephone competition that could be provided by small entities, such as small cable operators.

[3240] NPRM para. 277.

[3241] NPRM para. 7.

[3242] This good faith requirement is found in 47 U.S.C. § 251(c)(1).

1340. We do not adopt SCBA's proposal to establish abbreviated arbitration procedures.[3243] Most commenters oppose adoption of federal rules to govern state mediation and arbitration proceedings. As set out in Section XIV.A, we conclude that state commissions are better positioned to develop rules for mediation and arbitration that support the objectives of the 1996 Act. The rules we adopt in Section XIV.A apply only where the Commission assumes a state commission's responsibilities pursuant to section 252(e)(5). States may develop specific measures that address the concerns of small entities participating in mediation or arbitration, as suggested by SCBA. In addition, although we do not specifically incorporate SCBA's request that the Commission designate a "small company contact person at incumbent LECs and state commissions,"[3244] we find that a refusal throughout the negotiation process to designate a representative with authority to make binding representations on behalf of the party, and thereby significantly delay resolution of issues, would constitute failure to negotiate in good faith. Therefore, we conclude that the potential benefits of SCBA's proposal are achieved by our determination that the failure of an incumbent LEC to designate a person authorized to bind his or her company in negotiations is a violation of the good faith obligation of section 251.

C. Description and Estimates of the Number of Small Entities Affected by this Report and Order

1341. For the purposes of this Order, the RFA defines a "small business" to be the same as a "small business concern" under the Small Business Act, 15 U.S.C. § 632, unless the Commission has developed one or more definitions that are appropriate to its activities.[3245] Under the Small Business Act, a "small business concern" is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the Small Business Administration (SBA).[3246] SBA has defined businesses in Standard Industrial Classification (SIC) categories 4812 (Radiotelephone Communications) and 4813 (Telephone Communications, Except Radiotelephone) to be small entities when they have fewer than 1,500 employees.[3247] We first discuss generally the total number of small telephone companies falling within both of those SIC categories. Then, we discuss the number of small businesses within the two subcategories, and attempt to refine further those estimates to correspond with the categories of telephone companies that are commonly used under our rules.

[3243] SCBA RFA comments at 1-2.

[3244] SCBA RFA comments at 2.

[3245] *See* 15 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 5 U.S.C. § 632).

[3246] 15 U.S.C. § 632. *See, e.g., Brown Transport Truckload, Inc. v. Southern Wipers, Inc.*, 176 B.R. 82 (N.D. Ga. 1994).

[3247] 13 C.F.R. § 121.201.

1342. Consistent with our prior practice, we shall continue to exclude small incumbent LECs from the definition of a small entity for the purpose of this FRFA. Nevertheless, as mentioned above, we include small incumbent LECs in our FRFA. Accordingly, our use of the terms "small entities" and "small businesses" does not encompass "small incumbent LECs." We use the term "small incumbent LECs" to refer to any incumbent LECs that arguably might be defined by SBA as "small business concerns."[3248]

1. Telephone Companies (SIC 481)

1343. *Total Number of Telephone Companies Affected.* Many of the decisions and rules adopted herein may have a significant effect on a substantial number of the small telephone companies identified by SBA. The United States Bureau of the Census ("the Census Bureau") reports that, at the end of 1992, there were 3,497 firms engaged in providing telephone services, as defined therein, for at least one year.[3249] This number contains a variety of different categories of carriers, including local exchange carriers, interexchange carriers, competitive access providers, cellular carriers, mobile service carriers, operator service providers, pay telephone operators, PCS providers, covered SMR providers, and resellers. It seems certain that some of those 3,497 telephone service firms may not qualify as small entities or small incumbent LECs because they are not "independently owned and operated."[3250] For example, a PCS provider that is affiliated with an interexchange carrier having more than 1,500 employees would not meet the definition of a small business. It seems reasonable to conclude, therefore, that fewer than 3,497 telephone service firms are small entity telephone service firms or small incumbent LECs that may be affected by this Order.

1344. *Wireline Carriers and Service Providers.* SBA has developed a definition of small entities for telephone communications companies other than radiotelephone (wireless) companies. The Census Bureau reports that, there were 2,321 such telephone companies in operation for at least one year at the end of 1992.[3251] According to SBA's definition, a small business telephone company other than a radiotelephone company is one employing fewer than 1,500 persons.[3252] All but 26 of the 2,321 non-radiotelephone companies listed by the Census Bureau were reported to have fewer than 1,000 employees. Thus, even if all 26 of those companies had more than 1,500 employees, there would still be 2,295 non-radiotelephone companies that might qualify as

---

[3248] *Id.*

[3249] United States Department of Commerce, Bureau of the Census, *1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size*, at Firm Size 1-123 (1995) (*1992 Census*).

[3250] 15 U.S.C. § 632(a)(1).

[3251] *1992 Census, supra*, at Firm Size 1-123.

[3252] 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4812.

small entities or small incumbent LECs. Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of wireline carriers and service providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 2,295 small entity telephone communications companies other than radiotelephone companies that may be affected by the decisions and rules adopted in this Order.

1345. *Local Exchange Carriers.* Neither the Commission nor SBA has developed a definition of small providers of local exchange services (LECs). The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of LECs nationwide of which we are aware appears to be the data that we collect annually in connection with the Telecommunications Relay Service (TRS). According to our most recent data, 1,347 companies reported that they were engaged in the provision of local exchange services.[3253] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1,347 small incumbent LECs that may be affected by the decisions and rules adopted in this Order.

1346. *Interexchange Carriers.* Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of interexchange services (IXCs). The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of IXCs nationwide of which we are aware appears to be the data that we collect annually in connection with TRS. According to our most recent data, 97 companies reported that they were engaged in the provision of interexchange services.[3254] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of IXCs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 97 small entity IXCs that may be affected by the decisions and rules adopted in this Order.

1347. *Competitive Access Providers.* Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of competitive access services (CAPs). The closest applicable definition under SBA rules is for telephone communications

---

[3253] Federal Communications Commission, CCB, Industry Analysis Division, *Telecommunications Industry Revenue: TRS Fund Worksheet Data*, Tbl. 21 (Average Total Telecommunications Revenue Reported by Class of Carrier) (Feb. 1996) (*TRS Worksheet*).

[3254] *Id.*

companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of CAPs nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 30 companies reported that they were engaged in the provision of competitive access services.[3255] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of CAPs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 30 small entity CAPs that may be affected by the decisions and rules adopted in this Order.

1348. *Operator Service Providers.* Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of operator services. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of operator service providers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 29 companies reported that they were engaged in the provision of operator services.[3256] Although it seems certain that some of these companies are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of operator service providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 29 small entity operator service providers that may be affected by the decisions and rules adopted in this Order.

1349. *Pay Telephone Operators.* Neither the Commission nor SBA has developed a definition of small entities specifically applicable to pay telephone operators. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of pay telephone operators nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 197 companies reported that they were engaged in the provision of pay telephone services.[3257] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of pay telephone operators that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 197 small entity pay telephone operators that may be affected by the decisions and rules adopted in this Order.

[3255] *Id.*

[3256] *Id.*

[3257] *Id.*

1350. *Wireless (Radiotelephone) Carriers.* SBA has developed a definition of small entities for radiotelephone (wireless) companies. The Census Bureau reports that there were 1,176 such companies in operation for at least one year at the end of 1992.[3258] According to SBA's definition, a small business radiotelephone company is one employing fewer than 1,500 persons.[3259] The Census Bureau also reported that 1,164 of those radiotelephone companies had fewer than 1,000 employees. Thus, even if all of the remaining 12 companies had more than 1,500 employees, there would still be 1,164 radiotelephone companies that might qualify as small entities if they are independently owned are operated. Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of radiotelephone carriers and service providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1,164 small entity radiotelephone companies that may be affected by the decisions and rules adopted in this Order.

1351. *Cellular Service Carriers.* Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of cellular services. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of cellular service carriers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 789 companies reported that they were engaged in the provision of cellular services.[3260] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of cellular service carriers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 789 small entity cellular service carriers that may be affected by the decisions and rules adopted in this Order.

1352. *Mobile Service Carriers.* Neither the Commission nor SBA has developed a definition of small entities specifically applicable to mobile service carriers, such as paging companies. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of mobile service carriers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 117 companies reported that they were engaged in the provision of mobile

---

[3258] United States Department of Commerce, Bureau of the Census, *1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size*, at Firm Size 1-123 (1995) (*1992 Census*).

[3259] 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4812.

[3260] *Id.*

services.[3261] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of mobile service carriers that would qualify under SBA's definition. Consequently, we estimate that there are fewer than 117 small entity mobile service carriers that may be affected by the decisions and rules adopted in this Order.

1353. *Broadband PCS Licensees.* The broadband PCS spectrum is divided into six frequency blocks designated A through F. As set forth in 47 C.F.R. § 24.720(b), the Commission has defined "small entity" in the auctions for Blocks C and F as a firm that had average gross revenues of less than $40 million in the three previous calendar years. Our definition of a "small entity" in the context of broadband PCS auctions has been approved by SBA.[3262] The Commission has auctioned broadband PCS licenses in Blocks A, B, and C. We do not have sufficient data to determine how many small businesses bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auction. Based on this information, we conclude that the number of broadband PCS licensees affected by the decisions in this Order includes, at a minimum, the 90 winning bidders that qualified as small entities in the Block C broadband PCS auction.

1354. At present, no licenses have been awarded for Blocks D, E, and F of broadband PCS spectrum. Therefore, there are no small businesses currently providing these services. However, a total of 1,479 licenses will be awarded in the D, E, and F Block broadband PCS auctions, which are scheduled to begin on August 26, 1996. Eligibility for the 493 F Block licenses is limited to entrepreneurs with average gross revenues of less than $125 million.[3263] We cannot estimate, however, the number of these licenses that will be won by small entities under our definition, nor how many small entities will win D or E Block licenses. Given that nearly all radiotelephone companies have fewer than 1,000 employees[3264] and that no reliable estimate of the number of prospective D, E, and F Block licensees can be made, we assume for purposes of this FRFA, that all of the licenses in the D, E, and F Block Broadband PCS auctions may be awarded to small entities under our rules, which may be affected by the decisions and rules adopted in this Order.

[3261] *Id.*

[3262] *See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding*, PP Docket No. 93-253, Fifth Report and Order, 9 FCC Rcd 5532, 5581-84 (1994).

[3263] *Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, WT Docket No. 96-59, *Amendment of the Commission's Cellular/PCS Cross-Ownership Rule*, Report and Order, GN Docket No. 90-314, FCC 96-278 (rel. June 24, 1996).

[3264] *1992 Census*, Table 5, Employment Size of Firms: 1992, SIC Code 4812.

1355. *SMR Licensees.* Pursuant to 47 C.F.R. § 90.814(b)(1), the Commission has defined "small entity" in auctions for geographic area 800 MHz and 900 MHz SMR licenses as a firm that had average annual gross revenues of less than $15 million in the three previous calendar years. This definition of a "small entity" in the context of 800 MHz and 900 MHz SMR has been approved by the SBA.[3265] The rules adopted in this Order may apply to SMR providers in the 800 MHz and 900 MHz bands that either hold geographic area licenses or have obtained extended implementation authorizations. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of less than $15 million. We assume, for purposes of this FRFA, that all of the extended implementation authorizations may be held by small entities, which may be affected by the decisions and rules adopted in this Order.

1356. The Commission recently held auctions for geographic area licenses in the 900 MHz SMR band. There were 60 winning bidders who qualified as small entities in the 900 MHz auction. Based on this information, we conclude that the number of geographic area SMR licensees affected by the rule adopted in this Order includes these 60 small entities. No auctions have been held for 800 MHz geographic area SMR licenses. Therefore, no small entities currently hold these licenses. A total of 525 licenses will be awarded for the upper 200 channels in the 800 MHz geographic area SMR auction. However, the Commission has not yet determined how many licenses will be awarded for the lower 230 channels in the 800 MHz geographic area SMR auction. There is no basis, moreover, on which to estimate how many small entities will win these licenses. Given that nearly all radiotelephone companies have fewer than 1,000 employees and that no reliable estimate of the number of prospective 800 MHz licensees can be made, we assume, for purposes of this FRFA, that all of the licenses may be awarded to small entities who, thus, may be affected by the decisions in this Order.

1357. *Resellers.* Neither the Commission nor SBA has developed a definition of small entities specifically applicable to resellers. The closest applicable definition under SBA rules is for all telephone communications companies. The most reliable source of information regarding the number of resellers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 206 companies reported that they were engaged in the resale of telephone services.[3266] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500

[3265] *See Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool*, PR Docket No. 89-583, Second Order on Reconsideration and Seventh Report and Order, 11 FCC Rcd 2639, 2693-702 (1995); *Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band*, PR Docket No. 93-144, First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rulemaking, 11 FCC Rcd 1463 (1995).

[3266] *TRS Worksheet, supra.*

employees, we are unable at this time to estimate with greater precision the number of resellers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 206 small entity resellers that may be affected by the decisions and rules adopted in this Order.

2. Cable System Operators (SIC 4841)

1358. SBA has developed a definition of small entities for cable and other pay television services, which includes all such companies generating less than $11 million in revenue annually. This definition includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems and subscription television services. According to the Census Bureau, there were 1,323 such cable and other pay television services generating less than $10 million in revenue that were in operation for at least one year at the end of 1992.[3267]

1359. The Commission has developed its own definition of a small cable system operator for the purposes of rate regulation. Under the Commission's rules, a "small cable company," is one serving fewer than 400,000 subscribers nationwide.[3268] Based on our most recent information, we estimate that there were 1,439 cable operators that qualified as small cable system operators at the end of 1995.[3269] Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1,468 small entity cable system operators that may be affected by the decisions and rules adopted in this Order.

1360. The Communications Act also contains a definition of a small cable system operator, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[3270] There were 63,196,310 basic cable subscribers at the end of 1995, and 1,450 cable system operators serving fewer than one percent (631,960) of subscribers.[3271] Although it seems certain that some of these

---

[3267] *1992 Census, supra*, Table 4 (Revenue Size of Firms: 1992), SIC 4841.

[3268] 47 C.F.R. § 76.901(e). The Commission developed this definition based on its determination that a small cable system operator is one with annual revenues of $100 million or less. *Implementation of Sections of the 1992 Cable Act: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393.

[3269] Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

[3270] 47 U.S.C. § 543(m)(2).

[3271] Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

D. Summary Analysis of the Projected Reporting, Recordkeeping, and Other Compliance Requirements and Steps Taken to Minimize the Significant Economic Impact of this Report and Order on Small Entities and Small Incumbent LECs, Including the Significant Alternatives Considered and Rejected

1361. *Structure of the Analysis.* In this section of the FRFA, we analyze the projected reporting, recordkeeping, and other compliance requirements that may apply to small entities and small incumbent LECs as a result of this Order.[3272] As a part of this discussion, we mention some of the types of skills that will be needed to meet the new requirements. We also describe the steps taken to minimize the economic impact of our decisions on small entities and small incumbent LECs, including the significant alternatives considered and rejected.[3273] Due to the size of this Order, we set forth our analysis separately for individual sections of the item, using the same headings as were used above in the corresponding sections of the Order.

1362. We provide this summary analysis to provide context for our analysis in this FRFA. To the extent that any statement contained in this FRFA is perceived as creating ambiguity with respect to our rules or statements made in preceding sections of this Order, the rules and statements set forth in those preceding sections shall be controlling.

Summary Analysis of Section II SCOPE OF THE COMMISSION'S RULES

1363. *Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements.* As discussed in Section II.E, a common carrier, which may be a small entity or a small incumbent LEC, may be subject to an action for relief in several different fora if a party believes that small entity or incumbent LEC violated the standards under section 251 or 252. Should a small entity or a small incumbent LEC be subjected to such an action for relief, it will require the use of legal skills.

1364. *Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered.* We believe that our actions establishing minimum national rules will facilitate the development of competition in the local exchange and exchange

[3272] *See* 5 U.S.C. § 604(a)(4).

[3273] *See* 5 U.S.C. § 604(a)(5).

access markets for the reasons discussed in Sections II.A and II.B above. For example, national rules may: help equalize bargaining power; minimize the need for duplicative marketing strategies and multiple network configurations; lower administrative costs; lessen the need to re-litigate the same issue in multiple jurisdictions; and reduce delay and transaction costs, which can pose particular burdens for small businesses. In addition, our rules are designed to accommodate differences among regions and carriers, and the reduced regulatory burdens and increased certainty produced by national rules may be expected to minimize the economic impact of our decisions for all parties, including any small entities and small incumbent LECs. As set forth in Section II.A above, we reject suggestions to adopt more, or fewer, national rules than we ultimately adopt in this Order. We reject the arguments that we should establish "preferred outcomes" from which parties could deviate upon an adequate showing, or that we establish a process by which state commissions could seek a waiver from the Commission's rules, for the reasons set forth in Section II.B above.

1365. We believe that our determination that there are multiple methods for bringing enforcement actions against parties regarding their obligations under sections 251 and 252 will assist all parties, including small entities and small incumbent LECs, by providing a variety of methods and fora for seeking enforcement of such obligations. (Section II.E - Authority to Take Enforcement Action.) Similarly, our conclusion that Bell Operating Company (BOC) statements of generally available terms and conditions are governed by the same national rules that apply to agreements arbitrated under section 252 should ease administrative burdens for all parties in markets served by BOCs, which may include small entities, because they will not need to evaluate and comply with different sets of rules. (Section II.F - BOC Statements of Generally Available Terms.) Finally, we decline to adopt different requirements for agreements arbitrated under section 252 and BOC statements of generally available terms and conditions for the reasons set forth in section II.F above.

Summary Analysis of Section III
DUTY TO NEGOTIATE IN GOOD FAITH

1366. *Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements.* Incumbent LECs, including small incumbent LECs that receive requests for access to network elements and/or services pursuant to sections 251 and 252 of the Act will be required to negotiate in good faith over the terms of interconnection agreements. As set forth in Section III.C. above, this Order identifies several practices as violations of the duty to negotiate in good faith, including: (1) a party's seeking or entering into an agreement prohibiting disclosure of information requested by the FCC or a state commission, or supplied in support of a request for arbitration pursuant to section 252(b)(2)(B); (2) seeking or entering into an agreement precluding amendment of the agreement to account for changes in federal or state rules; (3) an incumbent's denial of a reasonable request for cost data during negotiations; and (4) an entrant's failure to provide to the incumbent LEC information necessary to reach agreement. Complying with the projected requirements of this section may require the use of legal skills, as discussed above in

Section III.D. In addition, incumbent LECs and new entrants having interconnection agreements that predate the 1996 Act must file such agreements with the state commission for approval under section 252(e).

1367. *Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered.* As set forth above, we believe our decision to establish national rules and a review process concerning parties' duties to negotiate in good faith are designed to facilitate good faith negotiations, which should minimize regulatory burdens and the economic impact of our decisions for all parties, including small entities and small incumbent LECs. (Section III.B. - Advantages and Disadvantages of National Rules.) We also expect economic impacts to be minimized for small entities seeking to enter into agreements with incumbent LECs as a result of the decision that incumbent LECs may not impose a bona fide request requirement on carriers seeking agreements pursuant to sections 251 and 252. (Section III.C. - Specific Practices that may Constitute a Violation of Good Faith Negotiation.) For the reasons set forth in Section III.D. above, we also find that certain additional practices are not always violations of the duty to negotiate in good faith, including the suggested alternative that all nondisclosure agreements violate the good faith duty.

1368. We do not require immediate filing of preexisting interconnection agreements, including those involving small incumbent LECs and small entities. We set an outer time limit of June 30, 1997, by which preexisting agreements between Class A carriers must be filed with the relevant state commission. This decision will ensure that third parties, including small entities, are not prevented indefinitely from reviewing and taking advantage of the terms of preexisting agreements. It also limits burdens that a national filing deadline might impose on small carriers. In addition, the determination that preexisting agreements must be filed with state commissions seems likely to foster opportunities for small entities and small incumbent LECs to gain access to such agreements without requiring investigation or discovery proceedings or other administrative burdens that could increase regulatory burdens. (Section III.D. - Applicability of Section 252 to Preexisting Agreements). For the reasons set forth in Section III.D. above, we reject the alternative of not requiring certain agreements to be filed with state commissions.

Summary Analysis of Section IV
INTERCONNECTION

1369. *Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements.* Incumbent LECs, including small incumbent LECs, are required by section 251(c) to provide interconnection to all requesting telecommunications carriers for the transmission and routing of telephone exchange service and exchange access service. Such interconnection must be: (1) provided at any technically feasible point; (2) at least equal in quality to that provided to the incumbent LEC itself and to any other parties with interconnection agreements; and (3)

provided on rates, terms, and conditions that are "just, reasonable, and nondiscriminatory . . . ."[3274] As set forth in Section IV.A. above, we conclude that interconnection refers solely to the physical linking of networks for the mutual exchange of traffic, and identify a minimum set of technically feasible points of interconnection. The minimum points at which an incumbent LEC, which may be a small incumbent LEC, must provide interconnection are: (1) the line side of a local switch; (2) the trunk side of a local switch; (3) the trunk interconnection points for a tandem switch; (4) central office cross-connect points; and (5) out-of-band signaling facilities. In addition, the points of access to unbundled elements (discussed below) are also technically feasible points of interconnection. Compliance with these requests may require the use of engineering, technical, operational, accounting, billing, and legal skills.

1370. To obtain interconnection pursuant to section 251(c)(2), telecommunications carriers must seek interconnection for the purpose of transmitting and routing telephone exchange traffic, or exchange access traffic, or both. (Section IV.E. - Definition of "Technically Feasible.") This will require new entrants to provide either local exchange service or exchange access service to obtain section 251(c)(2) interconnection. A requesting carrier will be required to bear the additional costs imposed on incumbent LECs as a result of interconnection. (Section IV.F. - Technically Feasible Points of Interconnection.) Carriers seeking interconnection, including small entities, may be required to collect information to refute claims by incumbent LECs that the requested interconnection poses a legitimate threat to network reliability. (*Id.*)

1371. *Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered.* The decision to adopt clear national rules in this section of the Order is also intended to help equalize bargaining power between incumbent LECs and requesting carriers, expedite and simplify negotiations, and facilitate comprehensive business and network planning. This could decrease entry barriers and provide reasonable opportunities for all carriers, including small entities and small incumbent LECs, to provide service in markets for local exchange and exchange access services. (Section IV.B. - National Interconnection Rules). National rules should also facilitate the consistent development of standards and resolution of issues, such as technical feasibility, without imposing additional litigation costs on parties, including small entities and small incumbent LECs. We determine that successful interconnection at a particular point in a network creates a rebuttable presumption that interconnection is technically feasible at other comparable points in the network. (Section IV.E - Definition of "Technically Feasible.") We also identify minimum points of interconnection where interconnection is presumptively technically feasible: (1) the line side of a switch; (2) the trunk side of a switch; (3) trunk interconnection points at a tandem switch; (4) central office cross-connect points; and (5) out-of-band signaling facilities. (Section IV.F - Technically Feasible Points of Interconnection.) These decisions may be expected to facilitate negotiations by promoting certainty and reducing transaction costs, which should minimize regulatory burdens

[3274] 47 U.S.C. § 251(c)(2).

and the economic impact of our decisions for all parties, including small entities and small incumbent LECs. We decline, however, to identify additional points where interconnection is technically feasible for the reasons set forth in section IV.F above.

1372. The ability to enter local markets by offering only telephone exchange service or only exchange access service may minimize regulatory burdens and the economic impact of our decisions for some entrants, including small entities. We decline, however, to interpret section 251(c)(2) as requiring incumbent LECs to provide interconnection to carriers seeking to offer only interexchange services for the reasons set forth in section IV.D. above. In addition, we determine that an incumbent LEC may refuse to interconnect on the grounds that specific, significant, and demonstrable network reliability concerns may make interconnection at a particular point sufficiently infeasible. We further determine that the incumbent LEC must prove such infeasibility to the state commission. (Section IV.E - Definition of "Technically Feasible.")

1373. Competitive carriers, many of whom may be small entities, will be permitted to request interconnection at any technically feasible point, and the determination of feasibility must be conducted without consideration of the cost of providing interconnection at a particular point. (Section IV.E. - Definition of "Technically Feasible.") Consequently, our rules permit the party requesting interconnection, which may be a small entity, and not the incumbent LEC to decide the points that are necessary to compete effectively. (Section IV.E. - Definition of "Technically Feasible"). We decline, however, to impose reciprocal terms and conditions for interconnection on carriers requesting interconnection. Our decision that an party requesting interconnection must pay the costs of interconnecting should minimize regulatory burdens and the economic impact of our interconnection decisions for small incumbent LECs. Similarly, regulatory burdens and the economic impact of our decisions may be minimized through the decision that, while a requesting party is permitted to obtain interconnection that is of higher quality than that which the incumbent LEC provides to itself, the requesting party must pay the additional costs of receiving the higher quality interconnection. (Section IV.H - Interconnection that is Equal in Quality.)

Summary Analysis of Section V
ACCESS TO UNBUNDLED NETWORK ELEMENTS

1374. *Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements.* Under section 251(c), incumbent LECs are required to provide nondiscriminatory access to unbundled network elements. We identify a minimum set of network elements: (1) local loops; (2) local and tandem switches; (3) interoffice transmission facilities; (4) network interface devices; (5) signaling and call-related database facilities; (6) operations support systems and functions; and (7) operator and directory assistance facilities. (Section V.J - Specific Unbundling Requirements.) Incumbent LECs are required to provide nondiscriminatory access to operations support systems and information by January 1, 1997. States may require incumbent LECs to provide additional network elements on an unbundled basis. As discussed in Section V.F. above, LECs must perform the functions necessary to combine unbundled elements in a

manner that allows requesting carriers to offer a telecommunications service, and the incumbent LEC may not impose restrictions on the subsequent use of network elements. Compliance with these requests may require the use of engineering, technical, operational, accounting, billing, and legal skills.

1375. If a requesting carrier, which may be a small entity, seeks access to an incumbent LEC's unbundled elements, the requesting carrier is required to compensate the incumbent LEC for any costs incurred to provide such access. For example, in the case of operation support systems functions, such work may include the development of interfaces for competing carriers to access incumbent LEC functions for pre-ordering, ordering, provisioning, maintenance and repair, and billing. Requesting carriers may also have to deploy their own operations support systems interfaces, including electronic interfaces, in order to access the incumbent LEC's operations support systems functions. The development of interfaces may require new entrants, including small entities, to perform engineering work. (Section V.J.5 - Operations Support Systems Unbundling.)

1376. *Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered.* The establishment of minimum national requirements for unbundled elements should facilitate negotiations and reduce regulatory burdens and uncertainty for all parties, including small entities and small incumbent LECs. National requirements for unbundling may allow new entrants, including small entities, to take advantage of economies of scale in network design, which may minimize the economic impact of our decision. As set forth in Section V.B, above, we reject several alternatives in making this determination, including proposals suggesting that the Commission should: (1) not identify any required elements; (2) allow the states exclusively to identify required elements; or (3) adopt an exhaustive list of elements.

1377. As set forth above, the 1996 Act defines a network element to include "all facilit(ies) or equipment used in the provision of a telecommunications service," and all "features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems and information sufficient for billing and collection or used in the transmission, routing or other provision of a telecommunications service." (Section V.C - Network Elements.) As a result, new entrants, which may include small entities, should have access to the same technologies and economies of scale and scope that are available to incumbent LECs. In reaching our determination, we reject for the reasons set forth in Section V.C above, the following alternatives: (1) that we should not adopt a method for identifying elements beyond those identified in the 1996 Act; and (2) that features sold directly to end users as retail services are not network elements. Finally, we reject the argument that requesting carriers, which may include small entities, are required to provide all services typically furnished by means of an element they purchase. (*Id.*) Our rejection of this last alternative may reduce burdens for some small entities by permitting them to offer some, but not all, of the services provided by the incumbent LEC.

1378. We conclude that the requirement to provide "access" to unbundled network elements is independent of the interconnection duty imposed by section 251(c)(2), and that such "access" must be provisioned under the rates, terms and conditions applicable to unbundled network elements. We believe these conclusions may provide small entities seeking to compete with incumbent LECs with the flexibility to offer other telecommunications services in addition to local exchange and exchange access services. (Section V.D. - Access to Network Elements.) For the reasons set forth above in Section V.D, we reject the argument that incumbent LECs are not required to provide access to an element's functionality, and that "access" to unbundled elements can only be achieved by interconnecting under the terms of section 251(c)(2).

1379. As set forth above, we conclude that an incumbent LEC, which may be a small incumbent LEC, may decline to provide a network element beyond those identified by the Commission where it can demonstrate that the network element is proprietary, and that the competing provider could offer the proposed telecommunications service using other nonproprietary elements within the incumbent's network. (Section V.E - Standards Necessary to Identify Unbundled Network Elements.) This should minimize regulatory burdens and the economic impact of our decisions for incumbent LECs, including small incumbent LECs, by permitting such entities to retain exclusive use of certain proprietary network elements.

1380. We conclude that incumbent LECs: (1) cannot impose restrictions, requirements or limitations on requests for, or the sale or use of, unbundled network elements; (2) must provide requesting carriers with all of the functionalities of a particular element so that requesting carriers can provide any telecommunications services that can be offered by means of that element; (3) must permit new entrants to combine network elements which new entrants purchase access to, if so requested; (4) must prove to a state commission that they cannot combine elements that are not ordinarily combined within an their network, or that are not ordinarily combined in that manner, because such combination is not technically feasible or it would impair the ability of other carriers to access unbundled elements and interconnect with the incumbent LEC; and (5) must provide the operational and support systems necessary to purchase and combine network elements. As a result of these conclusions, many small entities should face significantly reduced barriers to entry in markets for local exchange services. (Section V.F - Provision of a Telecommunications Service Using Unbundled Network Elements.) For the reasons set forth in section V.F, we reject the following alternatives: (1) that incumbent LECs, in all instances, must combine elements that are not ordinarily combined in their networks; and (2) that incumbent LECs are not obligated to combine elements for requesting carriers.

1381. By establishing minimum national rules concerning nondiscriminatory access to unbundled network elements, requesting carriers, including small entities, may face reduced transaction and regulatory costs in seeking to enter local telecommunications markets. Among the minimum rules are: (1) access and elements which new entrants receive are to be equal in quality between carriers; (2) incumbent LECs must prove technical infeasibility; (3) the rates, terms and conditions established for the provisioning of unbundled elements must be equal

between all carriers, and where applicable, between requesting carriers and the incumbent LEC itself, and they must provide efficient competitors with a meaningful opportunity to compete; and (4) incumbent LECs must provide carriers purchasing unbundled elements with access to electronic interfaces if incumbents use such functions themselves in provisioning telecommunications services. (Section V.G - Nondiscriminatory Access to Unbundled Network Elements.)

1382. As set forth above, we conclude that section 251(c)(3) does not require new entrants to own or control their own local exchange facilities in order to purchase and use unbundled network elements and, thus, new entrants can provide services solely by recombining unbundled network elements. (Section V.H - The Relationship Between Sections 251(c)(3) and 251(c)(4).)

1383. As discussed in Section V.J above, we adopt a minimum list of required unbundled network elements that incumbent LECs, including small incumbent LECs, must make available to requesting carriers. In adopting this list, we sought to minimize the regulatory burdens and economic impact for small incumbent LECs. For example, we declined to adopt a detailed list including many additional elements, as set forth in Section V.B. We aiso provided for the fact that certain LECs may possess switches that are incapable of performing customized routing for competitors, as discussed in Section V.J.2.(c).(ii).

Summary Analysis of Section VI
METHODS OF OBTAINING INTERCONNECTION AND ACCESS TO UNBUNDLED NETWORK ELEMENTS

1384. *Summary of Projected Reporting, Recordkeeping, and Other Compliance Requirements.* We conclude that Section 251(c)(6) requires incumbent LECs, including small incumbent LECs, to provide for any technically feasible method of interconnection or access to unbundled network elements, including physical collocation, virtual collocation, and meet-point interconnection. With certain modifications, we adopt some of the requirements concerning physical and virtual collocation that we adopted in the *Expanded Interconnection* proceeding. Compliance with these requests may require the use of engineering, technical, operational, accounting, billing, and legal skills.

1385. In a meet-point arrangement the new entrant will build out facilities to the agreed-upon point, which will likely entail the use of engineering and installation personnel as well as the acquisition of equipment. We allow incumbent LECs to impose reasonable restrictions on the warehousing of space by collocators. Therefore, small entities collocating equipment may be required to use the provided space for the collocation of equipment necessary for interconnection or access to unbundled network elements or risk losing the right to use that space. (Section VI.B.1.e - Allocation of Space.) To take advantage of its right to collocate equipment on an incumbent LEC's premises, competitive entrants, which may include small entities, will be

required to build or lease transmission facilities between their own equipment, located outside of the incumbent LECs' premises, and the collocated space. (Section VI.B.1.f - Leasing Transport Facilities.) We allow incumbent LECs to require reasonable security arrangements to separate an entrant's collocation space from the incumbent LEC's facilities. Small entities collocating equipment may therefore be required to pay for such security arrangements. (Section VI.B.1.h - Security Arrangements.)

1386. *Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered.* By readopting our *Expanded Interconnection* terms and conditions, which allow competitors to collocate equipment for interconnection with the incumbent LEC, regulatory burdens have likely been reduced because the terms and conditions for collocation have already been established. (Section VI.B.1.b - Adoption of *Expanded Interconnection* Terms and Conditions.) This seems likely to benefit all parties, including small entities and small incumbent LECs, since it should reduce the time and expense of negotiation, and reduce the costs of adapting to new terms and conditions for collocation.

1387. Due to our conclusion that requesting carriers may choose any method of technically feasible interconnection or access to unbundled elements, new entrants, including small entities, should have the flexibility to obtain interconnection or access in the manner that best suits their needs. (Section VI.A. - Methods of Obtaining Interconnection and Access to Unbundled Elements.) In particular, as discussed in Section VI.A.3, we recognize that carriers, including small entities, may find virtual collocation or meet-point arrangements more efficient than physical collocation in certain circumstances, particularly if they lack the resources to collocate physically in a large number of incumbent LEC premises.

1388. We adopt a broad definition of the term "premises," which should allow carriers, including small entities, to collocate equipment for interconnection and access to unbundled network elements at a range of incumbent LEC locations. (Section VI.B.1.c - The Meaning of the Term "Premises.") For the reasons set forth in Section VI.B above, we interpret the term "premises" broadly to include incumbent LEC central offices, serving wire centers and tandem offices, as well as all buildings or similar structures owned or leased by the incumbent LEC that house incumbent LEC facilities. However, as set forth above, we reject the suggestion that security measures be provided only at the request of the entrant, which should minimize regulatory burdens and the economic impact of our decisions for small incumbent LECs. (*Id.*)

1389. We interpret the statute broadly to allow collocation of any equipment used for interconnection or access to unbundled network elements. (Section VI.B.1.d - Collocation Equipment.) This standard should offer all competitors, including small entities, flexibility in collocating equipment they need to interconnect their networks to those of incumbent LECs. Incumbent LECs will also be required to make space available to requesting carriers on a first-come, first-served basis, and collocators seeking to expand their collocated space should be allowed to use contiguous space where available. (Section VI.B.1.e - Allocation of Space.)

These provisions should minimize regulatory burdens and economic impacts for small entity entrants by reducing opportunities for discriminatory treatment based on the size of the requesting carrier. We decline, however, to require incumbent LECs to file reports on the status, planned increase, and use of space for the reasons set forth in Section VI.B.1. above, which will reduce the regulatory burdens and economic impact of our decisions for small incumbent LECs.

1390. We conclude that a competitive entrant should be permitted to lease transmission facilities from the incumbent LEC. (Section VI.B.1.f - Leasing Transport Facilities). This provision will allow small entities to lease transmission facilities from incumbent LECs to transmit traffic between the collocated space and their own networks, which may be comparatively less burdensome for small entities than the alternative of bringing their own facilities to the collocated equipment on the incumbent LEC's premises. We also require incumbent LECs to permit two or more carriers that are collocating at the incumbent LEC's premises to interconnect their networks. (Section VI.B.1.g - Co-Carrier Cross-Connect.) This requirement should make it easier for new entrants to interconnect their networks with those of competitors.

1391. We require incumbent LECs to provide the relevant state commissions with detailed floor plans or diagrams of any premises where the incumbent LEC alleges that there are space constraints. (Section VI.B.1.i. - Allowing Virtual Collocation in Lieu of Physical). This requirement may reduce burdens for all parties, including small entities and small incumbent LECs, by aiding state commissions with their evaluation of incumbent LEC refusals to allow physical collocation on the grounds of space constraints. For the reasons set forth in Section VI.B.1 above, however, we decline to require incumbent LECs to lease additional space or provide trunking at no cost where they have insufficient space for physical collocation, which should minimize the regulatory burdens and economic impact of our decisions for incumbent LECs, including small incumbent LECs.

Summary Analysis of Section VII
PRICING OF INTERCONNECTION
AND UNBUNDLED NETWORK ELEMENTS

1392. *Summary of Projected Reporting, Recordkeeping, and Other Compliance Requirements.* Pursuant to sections 251(c) and 252(d) of the 1996 Act, incumbent LECs must provide interconnection and access to unbundled network elements on rates, terms, and conditions that are just, reasonable, and nondiscriminatory. In Section VII above, we adopt a methodology for setting arbitrated prices for interconnection and unbundled elements on the basis of forward-looking economic cost studies prepared in conformance with a methodology prescribed by the Commission. Until states utilize economic studies to develop cost-based prices, they must use default proxies established by the Commission. Small incumbent LECs may be required, therefore, to prepare economic cost studies. In addition, small entities seeking arbitration for rates for interconnection or unbundled elements may find it useful to prepare economic cost

studies or prepare critiques of cost studies prepared by incumbent LECs and others. In both cases, this may entail the use of economic experts, legal advice, and possibly accounting personnel.

1393. *Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered.* Our conclusion that prices for interconnection and unbundled elements should be set at forward-looking long-run economic cost, including a reasonable share of forward-looking joint and common costs, should permit new entrants, including small entities, to interconnect with, and acquire unbundled elements from, incumbent LECs at prices that replicate, to the extent possible, those in a competitive market. (Section VII.B.2 - Pricing of Interconnection and Unbundled Elements, Cost-Based Pricing Methodology, Rate Levels.) Our forward-looking economic cost methodology for determining prices is designed to permit incumbent LECs to recover their economic costs of providing interconnection and unbundled elements, which should minimize the economic impact of our decisions on small incumbent LECs.

1394. Our conclusion that embedded costs, opportunity costs and universal service subsidies may not be included in the rates for interconnection and unbundled elements is intended, in part, to avoid distortions in investment decisions, which should lead to more efficient allocation of resources, thereby reducing regulatory burdens and economic impacts for some small entities and small incumbent LECs. (Section VII.B.2 - Pricing of Interconnection and Unbundled Elements, Cost-Based Pricing Methodology, Rate Levels.) We reject proposals that would have permitted incumbent LECs to recover their embedded costs in prices for interconnection and unbundled elements as discussed above in Section VII.B.2.a.(3)(b). As discussed in Section VII.B.2.a.(3)(b), we reject the use of the efficient component pricing rule (ECPR) to set prices for interconnection and unbundled elements.

1395. Our conclusion that forward-looking common costs should be allocated in a reasonable manner should ensure that the prices of network elements that are least likely to be subject to competition are not artificially inflated by large allocations of common costs. This, in turn, may also produce more efficient allocations of resources, thereby minimizing regulatory burdens and economic effects for many parties, including small entities and small incumbent LECs. (Section VII.B.2 - Pricing of Interconnection and Unbundled Elements, Cost-Based Pricing Methodology, Rate Levels.) We permit, but do not require, states to impose peak-sensitive pricing systems for shared facilities as discussed in Section VII.B.3.b.

1396. We conclude that incumbent LECs should not recover access charges from entrants that use unbundled network facilities to provide access services to customers that they win from incumbent LECs. We do, however, permit incumbent LECs to impose on purchasers of unbundled local switching the carrier common line charge and a charge equal to seventy-five percent of the transport interconnection charge for an interim period that shall end no later than June 30, 1997, as discussed in Section VII.B.2.a.(3)(b). As further explained in that section, this

mechanism should serve to reduce any short-term disruptive impact of our decisions on incumbent LECs, including small incumbent LECs.

1397. We conclude that the Act requires rates for interconnection and unbundled elements to be geographically deaveraged, using a minimum of three geographic zones, in a manner that appropriately reflects the costs of the underlying elements. (Section VII.B.3.c. - Geographic/Class-of-Service Averaging.) We also conclude that distinctions between the rates charged to requesting carriers for network elements should not vary based on the classes of service that the requesting carriers provide to their to customers. We expect these decisions to lead to increased competition and a more efficient allocation of resources.

1398. The default proxies we adopt for rates for interconnection and unbundled elements, which states may use to establish prices, are designed to approximate prices that will enable efficient competitors, including small entities, to enter local exchange markets. (Section VII.C. - Default Proxy Ceilings and Ranges.) We reject the use of rates in interconnection agreements that predate the 1996 Act as proxy-based ceilings for interconnection and unbundled element rates as discussed in Section VII.C.1. We also decline to adopt a generic cost model at this time, as discussed in Section VII.C.3.

1399. We determine that the nondiscrimination provisions in the Act prohibit price differences that are not based on cost differences. This should permit small entities to obtain the same terms and conditions of agreements reached by larger carriers that possess greater bargaining power without having to incur the costs of negotiation and/or arbitration. (Section VII.D.3 - Discrimination.)

Summary Analysis of Section VIII
RESALE

1400. *Summary of Projected Reporting, Recordkeeping, and Other Compliance Requirements.* Pursuant to section 251(b)(1), all LECs, which may include small entity competing LECs and small incumbent LECs, may not impose unreasonable or discriminatory conditions on, or limit the resale of, their telecommunications services. Pursuant to section 251(c)(4), incumbent LECs are required to offer for resale at wholesale rates any telecommunications services that they offer to subscribers other than telecommunications carriers. Providing such services for resale may require some small entities and small incumbent LECs to use additional billing, technical, and operational skills.

1401. Under section 252(a), resellers, which may include small entities, are required to prepare and present to incumbent LECs requests for services to resell. We do not establish guidelines for the content of these requests. Such requests may involve legal, engineering, and accounting skills. Resellers may also have to engage in arbitration proceedings with incumbent LECs if voluntary negotiations resulting from the initial request fail to yield an agreement. This

may involve legal and general negotiation skills. Where a reseller is negotiating or arbitrating with an incumbent LEC, the reseller may choose to offer arguments concerning economic and accounting data presented by state commissions or incumbent LECs. Resellers may also choose to make legal and economic arguments that certain resale restrictions are unreasonable. These tasks may require legal, economic, and accounting skills.

1402. *Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered.* As set forth in Section VIII.B, above, our decision to adopt clear national rules should reduce regulatory burdens and uncertainty for all parties, including small entities and small incumbent LECs. Moreover, our decision not to impose eligibility requirements on resellers should minimize regulatory burdens for resellers. We reject proposals that the Commission not require resale of bundled service offerings, promotions and discounts lasting longer than 90 days, residential service, and services offered at rates below cost for reasons set forth in Section VIII.A.

1403. As discussed in Section VIII.B, we expect that the opportunity to resell telecommunications services currently offered exclusively by incumbent LECs will lead to increased competition in the provision of telecommunications services. We also determine that non-cost-based factors shall not be considered when arriving at wholesale discounts, and we reject the argument that indirect costs should not be considered avoided costs. We also reject proposals that we either require or forbid a state to include a measure of profit in its avoided cost calculation. As set forth in Section VIII.B, we considered the concerns of small incumbent LECs and small entity resellers when adopting the default range for wholesale discounts. In addition, we allow a state to consider including in wholesale rates the costs that incumbent LECs incur in selling services on a wholesale basis, which may minimize the economic impact for small incumbent LECs.

1404. As discussed in Section VIII.C, we remove obstacles faced by small businesses in reselling telecommunications services by establishing a presumption, applicable to incumbent and non-incumbent LECs, that most restrictions on resale are unreasonable. This presumption should reduce unnecessary burdens on resellers, which may include small entities. It may also produce increased opportunities for resale competition, which may be expected to be beneficial for some small entities and small incumbent LECs. We do not permit state commissions to require non-incumbent LECs to offer their services at wholesale rates for the reasons set forth Section VIII.D. For the reasons discussed in Section VIII.C, above, we decline to forbear from the application of section 251(b)(1) to non-incumbent LECs. We also conclude that incumbent LECs are to continue to receive access charge revenues when local services are resold under section 251(c)(4) for reasons set forth in Section VIII.E, and that such access services are not subject to resale at wholesale rates for reasons set forth in Section VIII.A.

Summary Analysis of Section IX
DUTIES IMPOSED ON "TELECOMMUNICATIONS CARRIERS" BY SECTION 251(a)

1405. *Summary of Projected Reporting, Recordkeeping, and Other Compliance Requirements.* Small entities that provide telecommunications services are subject to the same obligations imposed on all telecommunications carriers under section 251(a)(1) and section 251(a)(2), and any reporting requirements that attend such obligations. Among these duties is the duty to interconnect, directly or indirectly, with requesting telecommunications carriers. (Section IX - Duties Imposed on "Telecommunications Carriers" By Section 251(a).) This will likely require small entities to comply with the technical, economic, and legal requirements involved with interconnection, including negotiating contracts, utilizing engineering studies, and adding operational capacity. (*Id.*) Small incumbent LECs may incur similar compliance requirements to the extent they are required to interconnect with entities that qualify as "telecommunications carriers."

1406. Small incumbent LECs and small entities providing telecommunications services will also be under a duty not to install network features, functions, and capabilities that do not comply with standards and guidelines under sections 255 and 256. (Section IX - Duties Imposed on "Telecommunications Carriers" By Section 251(a)(2).) In addition, small entities that provide both information services and telecommunications services are classified as telecommunications carriers and are subject to certain requirements under 251(a). (Section IX - Duties Imposed on "Telecommunications Carriers" By Section 251(a)(2).)

1407. *Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered.* Small entities who provide for a fee local, interexchange and international services are defined as telecommunications carriers and, thus, also receive the benefits of section 251 including interconnection, services, and network elements, which may increase their ability to compete. (Section IX - Duties Imposed on "Telecommunications Carriers" By Section 251(a)(2).) We reject the suggestion that CMRS providers, some of which likely are small entities, should not be included in the definition of a "telecommunications carrier." (*Id.*) We determine that entities operating private, internal or shared communications networks do not qualify as telecommunications carriers, however, which excludes them from the obligations and benefits under section 251(a). Small entities providing information services but not telecommunications services are also not classified as telecommunications carriers and, thus, will not be bound by the duties of section 251(a). A carrier that provides both information and telecommunications services is deemed subject to the requirements of section 251(a). We also conclude that telecommunications carriers that have interconnected under either section 251(a)(1) or 251(c)(2) may offer information services through the same arrangement or agreement. This will permit new entrants, many of which may be small entities, to offer full ranges of services to end users without having to provide some of those services inefficiently through distinct facilities or agreements.

1408. We decide that competitive telecommunications carriers that have the obligation to interconnect with requesting carriers may choose, based upon their own characteristics, whether to allow direct or indirect interconnection. (Section IX - Duties Imposed on "Telecommunications Carriers" By Section 251(a).) This should allow significant flexibility for small entities to choose the most efficient and economical arrangement for their particular strategy. As set forth in Section IX, we reject an argument to forbear, under section 10 of the Communications Act,[3275] from imposing any interconnection requirements on non-dominant carriers.

Summary Analysis of Section X
COMMERCIAL MOBILE RADIO SERVICES

1409. *Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements.* We are applying sections 251 and 252 to LEC-CMRS interconnection at this time. (Section X.D - Jurisdictional Authority for Regulation of LEC-CMRS Interconnection Rates.) We may revisit our determination not to invoke jurisdiction under section 332 to regulate LEC-CMRS interconnection rates if we determine that the regulatory scheme established by sections 251 and 252 does not sufficiently address the problems encountered by CMRS providers, many of which may be small entities, in obtaining interconnection on terms and conditions that are just, reasonable, and nondiscriminatory.

1410. Pursuant to our findings in Section X.D, a small CMRS entity seeking to enter into a reciprocal compensation agreement with an incumbent LEC, which may be a small incumbent LEC, will have to comply with sections 251 and 252, and state law. The reporting, recordkeeping, and other compliance requirements associated with reciprocal compensation are summarized in the following section concerning obligations under section 251(b).

1411. *Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered.* The Commission's actions may minimize the economic impact on CMRS providers, many of which are small entities, by declaring that CMRS providers are not required to comply with the obligations of LECs under section 251(b)(5). We decline to adopt the alternative of finding that a CMRS provider is a LEC for the reasons set forth in Section X.A. We also determine that CMRS providers are entitled to request reciprocal compensation under section 251(b)(5), and that certain CMRS providers are also entitled to request interconnection under section 251(c)(2). As discussed in the following section concerning obligations under section 251(b), these decisions may permit small entity CMRS providers the opportunity to considerably expand their businesses.

Summary Analysis of Section XI
OBLIGATIONS IMPOSED ON LECS BY 251(b)

[3275] 47 U.S.C. § 160.

A. Reciprocal Compensation for Transport and Termination of Telecommunications

1412. *Summary of Projected Reporting, Recordkeeping, and Other Compliance Requirements.* All local exchange carriers, including small incumbent LECs and perhaps some small entities offering competing local exchange services, have a duty to establish reciprocal compensation for the transport and termination of local telecommunications traffic, as defined by state commissions. As such, small incumbent LECs and small entities offering competitive local exchange services may be required to measure the exchange of traffic, and to bill and collect payment from other carriers. (Section XI.A - Reciprocal Compensation for Transport and Termination of Telecommunications.) Reciprocal compensation for the transport and termination of traffic may be based on the incumbent LEC's cost studies, which may require small incumbent LECs to use economic skills to perform cost studies. To the extent that a competing provider of local exchange services, which may include a small entity, believes its costs for the transportation and termination of traffic differ from those of the incumbent LEC, it would also be required to provide a forward-looking, economic cost study. (*Id.*)

1413. If a CMRS provider entered into an agreement with an incumbent LEC prior to August 8, 1996 that does not provide for mutual compensation, the CMRS provider may demand to renegotiate the agreement. This may impose the burden of re-negotiation on small incumbent LECs, which may require legal, accounting, and economic skills. In addition, pending the successful completion of negotiation or arbitration, symmetrical reciprocal compensation shall apply, which may have the effect of raising the amount small incumbent LECs currently pay CMRS providers to terminate LEC-originated traffic. This may have the effect of increasing small incumbent LECs' costs. Finally, a state commission may impose bill-and-keep arrangements between carriers if the state commission determines that the amount of local telecommunications traffic from one network to the other is approximately equal to the amount of local telecommunications traffic flowing in the opposite directions, and is expected to remain thus. This could have the effect of reducing small incumbent LECs' revenues and decreasing the expenses of small entities. It also might place a burden on small entities and small incumbent LECs of establishing that traffic volumes are imbalanced, which might require accounting, economic, and legal skills.

1414. We require paging companies seeking to recover fees for terminating local calls to demonstrate to the state the costs of terminating such calls. (Section XI.A. - Reciprocal Compensation for Transport and Termination of Traffic.) Consequently, small entity paging companies and possibly small incumbent LECs may be required to use legal, economic, and possibly accounting skills.

1415. *Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered.* Our adoption of national default price ceilings and ranges for transportation and termination of local traffic being arbitrated by the states should

provide all parties, including small incumbent LECs and many new entrant small entities, with a clear understanding of the terms and conditions that will govern should they fail to reach an agreement. This should minimize regulatory burdens and economic impacts for those companies, in part by reducing the transaction costs of arbitration. (Section XI.A.3.c.(4) - Default Proxies.) Permitting CMRS providers with non-reciprocal agreements to renegotiate their agreements, and imposing symmetrical reciprocal compensation pending completion of negotiation or arbitration, will provide all parties with certainty as to applicable rates as of the date of this order, and minimize litigation and regulatory costs. We believe this decision is consistent with the pro-competitive goals of the 1996 Act.

1416. We define transport and termination as separate functions -- each with its own cost calculation for the purposes of sections 251 and 252. This definition may permit interconnecting carriers, including small entities, to obtain transport and termination services at lower rates and avoid paying above-cost rates or rates for unneeded services. (Section XI.A.2 - Definition of Transport and Termination of Telecommunications.) We also conclude that a LEC may not charge a CMRS provider or other carrier, which may be a small entity, for receiving and terminating LEC-originated traffic. (Section XI.A.4 - Symmetry.) We do not permit interexchange carriers to use transport and termination services to avoid the obligation to pay access charges for terminating interexchange traffic with incumbent LECs. (Section XI.A.2 - Definition of Transport and Termination of Telecommunications.)

1417. Our decision to permit new entrants to base reciprocal compensation arrangements on incumbent LECs' cost studies may reduce barriers to entry by permitting competing LECs to avoid performing their own forward-looking, economic cost studies, which may be expected to reduce the overall burdens and minimize the economic impact of regulation on these small entities. (Section XI.A.4 - Symmetry.) The ability of state commissions to impose bill and keep arrangements where the costs of terminating traffic are nearly symmetrical, traffic volume is roughly balanced, and both are expected to remain so, may allow small entities and small incumbent LECs to avoid the cost of measuring traffic exchange. (Section XI.A.5 - Bill and Keep.) For the reasons set forth in Section XI.A.5 above, we reject the proposed alternative of permitting states to adopt bill-and-keep arrangements for the transport and termination of traffic where the cost of terminating traffic is not nearly symmetrical.

1418. By requiring that rates for transport and termination be cost based, we believe that all parties in telecommunications markets, including small incumbent LECs and small entities, may benefit from increased opportunities to compete effectively in local exchange markets. (Section XI.A.3 - Pricing Methodology.) In addition, we conclude that termination rates for LECs, including small incumbent LECs, should include an allocation of forward-looking common costs, but not an element for the recovery of lost contributions. These decisions may be expected to minimize the economic impact of our decisions on small incumbent LECs and small entities.

1419. This Order eliminates certain charges paging companies may now be assessed by LECs and enables paging companies to claim new revenues from LECs for terminating paging calls. (Section XI.A - Reciprocal Compensation for Transport and Termination of Traffic.) Paging companies, including small entities, may thereby incur lower costs. Such entities also may increase their revenues, depending on the outcome of any proceedings concerning their termination costs. For the reasons set forth in Section XI.A.3 above, we cannot conclude, at this time, that a LEC's forward looking costs may be used as a reasonable proxy for the costs of call termination by paging providers. We further conclude that the default price for termination of traffic from the end office that we adopt in this proceeding in Section XI.A.3 above does not apply to termination of traffic by paging providers. This default price is based on estimates in the record of the costs to LECs of termination from the end office or end-office switching.

B. Access to Rights-of-Way

1420. *Summary of Projected Reporting, Recordkeeping, and Other Compliance Requirements.* Small incumbent LECs that meet the definition of a utility[3276] and own poles, ducts, conduits and rights-of-way where access was not previously mandated are now required to provide access to requesting telecommunications carriers (other than incumbent LECs and cable television systems) which may require the use of legal, engineering, and accounting resources for evaluation and processing of attachment requests. (Section XI.B.2 - Section 224(f): Non-discriminatory Access.) This may also require small incumbent LECs and small entities to employ technical personnel to modify pole attachment arrangements.

1421. A complaint of unjustified denial of access must be supported by a written request for access, the utility's response, and information supporting the complainant's position. This will likely impose some recordkeeping requirements on small incumbent LECs and small entities seeking access to rights-of-way. Our requirements may also impose administrative requirements, including legal and engineering expertise, on small governmental jurisdictions[3277] that resolve disputes arising under section 224 of the Communications Act. (Section XI.B.5 - Dispute Resolution.) In addition, small governmental jurisdictions that have established rules and regulations for access to poles, ducts and conduits specifically, and interconnection generally, are also likely to have some level of reporting and recordkeeping requirements for competing telecommunications carriers that use the poles, some of which may be small entities. (Section XI.B.6 - Reverse Preemption.)

[3276] The Act defines "utility" as "any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communication." 47 U.S.C. § 224(a)(1).

[3277] Under the Regulatory Flexibility Act, a "small governmental jurisdiction" is one type of "small entity," and is defined as the "governments of cities, counties, towns, townships, villages, school districts, or special districts with a population of less than fifty thousand . . . ." 5 U.S.C. § 601(5).

1422. *Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered.* In placing the burden of proof on the denying utility with respect to the propriety of a denial of access, we recognize that new entrants, which may be small entities, are not likely to have access to such information without cooperation from the utilities. Complaints should not be dismissed where the petitioner was unable to obtain a written response from the denying utility, or where the utility also denied the petitioner any relevant information needed to establish a prima facie case. These provisions should allow an entrant to pursue a claim without the need for expensive discovery, and should not preclude or discourage entities with limited resources from seeking redress where access is denied. (Section XI.B.5 - Dispute Resolution.) For the reasons set forth in Section XI.B.5, we reject the recommendation that an applicant be allowed to seek injunctive relief in federal court and select federal jurisdiction for enforcement or appeal of any matter regarding pole attachments. Our conclusion that state and local pole attachment requirements are presumed reasonable may minimize burdens on small governmental jurisdictions by preserving existing rules and procedures, and the local government's expertise with its own rules. (Section XI.B.2.c.2. - Specific Rules.) In reaching this result, we reject the alternative of invalidating such state regulations in favor of federal rules for the reasons stated in Section XI.B.2. Our determination not to prescribe numerous specific rules in this area recognizes the varying technologies and facilities deployed by incumbent LECs, including small incumbent LECs. For example, we recognize that utilities, including small incumbent LECs, normally have their own operating standards that dictate conditions of access. Thus, we leave in place such conditions of access. For the reasons set forth in Section XI.B., we reject the alternative of prescribing a comprehensive set of substantive engineering standards governing access to rights-of-way.

1423. When an attaching entity modifies poles for its use, it will be entitled to recover a share of its expenses from any later-attaching entities. (Section XI.B.4 - Modifications.) This should permit attaching entities that modify poles, some of which may be small entities, to bear only their proportionate costs and prevent them from effectively subsidizing their later-entering competitors. The requirement that utilities provide attaching entities with 60 days' notice prior to commencing modifications to any pole, duct or conduit should provide attaching entities, some of which may be small entities, with sufficient time to evaluate the impact of the proposed modification on their interests and to plan and coordinate any modifications to their own attachments. (*Id.*)

C. Imposing Additional Obligations on LECs

1424. *Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements.* Our decisions in this section of the Order do not subject any small entities to reporting, recordkeeping or other compliance requirements.

1425. *Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered.* The determination that the 1996 Act does not

permit the particular obligations for incumbent LECs set forth in section 251(c) to be imposed on non-incumbent carriers, absent a finding by the Commission under section 251(h)(2), should limit potential burdens on new entrants, including small entities. (Section XI.C - Imposing Obligations on LECs.)

Summary Analysis of Section XII
EXEMPTIONS, SUSPENSIONS AND MODIFICATIONS OF SECTION 251 REQUIREMENTS

1426. *Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements.* Section 251(f)(1) grants rural telephone companies, which may be small incumbent LECs, an exemption from the requirements of section 251(c) (which only apply to incumbent LECs) until the rural telephone company has received a bona fide request for interconnection, services, or network elements, and the state determines that the exemption should be terminated. Section 251(f)(2) provides that LECs with fewer than two percent of the nation's subscriber lines may petition a state commission for a suspension or modification of any requirements of sections 251(b) and 251(c). The latter provision, section 251(f)(2), is available to all LECs including competitive LECs, which may be small entities.

1427. After a carrier has made a bona fide request under Section 251, a rural telephone company, which may be a small incumbent LEC, seeking to retain its exemption under section 251(f)(1) must prove to the state commission that it should retain its exemption. To remove the exemption, a state commission must find that the bona fide interconnection request is not unduly economically burdensome, is technically feasible, and is consistent with section 254. The parties involved in such a proceeding may need to use legal, accounting, economic and/or engineering services. A small incumbent LEC or a competitive LEC, which may be a small entity, seeking under 251(f)(2) to modify or suspend the national interconnection requirements imposed by section 251(b) or 251(c) bears the burden of proving that interconnection would: (1) create a significant adverse economic impact on telecommunications users; (2) be unduly economically burdensome; or (3) be technically infeasible.

1428. *Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered.* As set forth in Section XII above, the determination whether a section 251(f) exemption, suspension, or modification should be continued or granted lies primarily with the relevant state commission. By largely leaving this determination to the states, our decisions permit this fact-specific inquiry to be administered in a manner that minimizes regulatory burdens and the economic impact on small entities and small incumbent LECs. However, to further minimize regulatory burdens and minimize the economic impact of our decision, we adopt several rules as set forth in Section XII above, which may facilitate the efficient resolution of such inquiries, provide guidance, and minimize uncertainty. As set forth in Section XII above, we find that the rural LEC or smaller LEC must prove to the state commission that the financial harm shown to justify an exemption, suspension, or

modification would be greater than the harm that might typically be expected as a result of competition. Finally, we conclude that section 251(f) adequately provides for varying treatment for smaller or rural LECs where such variances are justified. As a result, we expect that section 251(f) will significantly minimize regulatory burdens and economic impacts from the rules adopted in this Order.

Summary Analysis of Section XIII
ADVANCED TELECOMMUNICATIONS CAPABILITIES

1429. *Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements.* Our decision to defer consideration of rules in this section of the Order does not subject any small entities or small incumbent LECs to reporting, recordkeeping or other compliance requirements.

1430. *Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered.* We do not anticipate that our decision to defer consideration of rules in this section of the Order will have any economic impact on small entities or small incumbent LECs.

Summary Analysis of Section XIV
PROVISIONS OF SECTION 252

A. Section 252(e)(5)

1431. *Summary of Projected Reporting, Recordkeeping, and Other Compliance Requirements.* Pursuant to section 252(b)(1), a party to negotiation may petition a state commission to arbitrate any open issues. Small entities and small incumbent LECs negotiating interconnection agreements may, therefore, participate in state arbitration in order to obtain an interconnection agreement, which may impose significant legal costs. (Section XIV.A - Section 252(e)(5).) Section 252(e)(5) requires the Commission to assume the state's responsibility under section 252 if the state "fails to act to carry out its responsibility" under the section. We require an aggrieved party, which may be a small entity or a small incumbent LEC, to notify the FCC that a state commission has failed to act under section 252 by filing a detailed written petition, backed by affidavit. As set forth above in Section XIV.A, if the Commission, following a notice and comment period, determines that the state has failed to act, the Commission will assume authority under section 252(e)(5) and mediate or arbitrate the dispute. This process may also entail significant legal expertise.

1432. *Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered.* In this Order, the Commission adopts a minimum set of rules that will provide notice of the standards and procedures that the Commission will use if it has to assume the responsibility of a state commission under section 252(e)(5). These rules

should benefit small entities and small incumbent LECs by limiting uncertainty and minimizing transaction costs associated with the arbitration process. (Section XIV.A - 252(e)(5).)

1433. The Commission concludes that, if it arbitrates agreements, it will use a "final offer" arbitration method, whereby each party to the arbitration proposes its best and final offer, and the arbitrator chooses between the proposals. The arbitrator may choose either proposal in its entirety, or could choose different parties' proposals on an issue-by-issue basis. This method of arbitration should minimize the economic impact on small entities and small incumbent LECs by reducing the transaction costs associated with arbitration. Our rules should also encourage parties, to negotiate after offers are submitted which should provide additional flexibility for parties including small entities and small incumbent LECs, to agree to a resolution tailored to their interests. (Section XIV.A - 252(e)(5).)

1434. For the reasons set forth above in Section XIV.A, we reject the alternative of adopting national rules governing state arbitration procedures. We believe the states are in a better position to develop mediation and arbitration rules that support the objectives of the 1996 Act. States may develop specific measures that best address the concerns of small entities and small incumbent LECs participating in mediation or arbitration.

1435. As set forth above in Section XIV.A, we reject the suggestion that the Commission return jurisdiction over an arbitration to the state commission. We further reject the argument that, once the Commission has mediated or arbitrated an agreement, the agreement must be submitted to the state commission for approval under state law. We decline to adopt the alternative suggested by some parties that, if the Commission steps into the state commission role, it is bound by state laws and standards that would have applied to the state commission. (Section XIV.A - 252(e)(5)).

1436. As explained above in Section XIV.A, we also reject the alternative that an arbitrated agreement not be binding on the parties. Finally, we reject the alternative of opening the arbitration process to all third parties, which should minimize the costs involved in such proceedings.

B. Requirements of Section 252(i)

1437. *Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements.* Our decisions in this section of the Order do not subject any small entities to reporting, recordkeeping or other compliance requirements. Incumbent LECs, including small incumbent LECs, are required to file with state commissions all interconnection agreements entered into with other carriers, including adjacent incumbent LECs. Incumbent LECs must also permit third parties to obtain any individual interconnection, service or network element arrangement on the same terms and conditions as those contained in any agreement approved under section 252. Moreover, incumbent LECs must prove with specificity that terms and

conditions contained in filed agreements are legitimately related to the purchase of the individual element or service being sought. Incumbent LECs must provide "most favored nation" status with regard to subsequent carriers regardless of whether they include "most favored nation" clauses in their agreements. Complying with these requirements may require small incumbent LECs and requesting small entities to use legal and negotiation skills.

1438. *Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered.* Our decision to adopt national standards to implement section 252(i) should minimize the economic impact of our decision on both small entities and small incumbent LECs by expediting the resolution of disputes, thereby reducing transaction costs associated with interconnection. Our decision that section 252(i) permits requesting carriers to choose among individual provisions contained in publicly-filed interconnection agreements should minimize the economic impact for small new entrants by permitting them to obtain the provisions they desire without having to adopt entire agreements that would not reflect their costs or the specific technical characteristics of their networks. (Section XIV.B - Requirements of Section 252(i).) Moreover, small entities may be able to obtain the same terms and conditions of agreements reached by larger carriers that possess greater bargaining power without having to incur the costs of negotiation and/or arbitration.

1439. We also determine that publicly-filed agreements need only be made available to carriers who cause incumbent LECs to incur no greater costs than did the original carrier, which should minimize the economic impact on small incumbent LECs. We also minimize the regulatory burden for small entities and small incumbent LECs by finding that a new entrant seeking interconnection, network elements, or services pursuant to section 252(i) need not make such requests pursuant to the procedures for initial section 251 requests, but shall be permitted to obtain access to agreements on an expedited basis.

1440. As set forth above, we conclude that section 252(i) permits differential treatment of carriers based on differences in the costs of serving those carriers, but does not permit incumbent LECs to limit the availability of interconnection, services, or network elements only to those requesting carriers serving a comparable class of subscribers or providing the same service as the original party to the agreement. (Section XIV.B. - Requirements of Section 252(i).) These decisions should minimize the impact on small entities by preventing discrimination and enabling them to obtain the same terms and conditions as larger carriers that possess greater bargaining power. For the reasons set forth in Section XIV.B., we reject the interpretation favored by commenters arguing that new entrants should not be able to choose among provisions of interconnection agreements filed with state commissions.

E. Report to Congress

1441. The Commission shall send a copy of this FRFA, along with this Order, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, 5

U.S.C. § 801(a)(1)(A). A copy of this FRFA will also be published in the Federal Register.

XVI. ORDERING CLAUSES

1442. Accordingly, IT IS ORDERED that, pursuant to Sections 1-4, 201-209, 214, 218, 224, 251, 252, and 303(r) of the Communications Act of 1934, as amended, and Section 601 of the Telecommunications Act of 1996, 47 U.S.C. §§ 151-154, 201-209, 214, 218, 224, 251, 252, 303(r), the REPORT AND ORDER IS ADOPTED, effective 30 days after publication of a summary in the Federal Register. The collections of information contained within are contingent upon approval by the Office of Management and Budget.

1443. IT IS FURTHER ORDERED that Part 51 of the Commission's rules, 47 C.F.R. § 51 is ADDED as set forth in Appendix B hereto.

1444. IT IS FURTHER ORDERED that, to the extent issues from CC Docket No. 95-185, *In the Matter of Interconnection Between Local Exchange Carriers and Commercial Mobile Service Providers*, are resolved here, we incorporate the relevant portions of the record in that docket.

1445. IT IS FURTHER ORDERED that, to the extent issues from CC Docket No. 91-346, *In the Matter of Intelligent Networks*, are resolved here, we incorporate the relevant portions of the record in that docket.

1446. IT IS FURTHER ORDERED, in light of the United States Court of Appeals for the District of Columbia Circuit in *Pacific Bell v. FCC*, 81 F.3d 1147 (D.C. Cir. 1996) (table) and the Telecommunications Act of 1996, that the rules and policies adopted in *Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-141, 9 FCC Rcd 5154 (1994), shall remain in effect.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

List of Commenters in CC Docket No. 96-98

360o Communications Company (360 Communications)
Ad Hoc Coalition of Corporate Telecommunications Managers
Ad Hoc Telecommunications Users Committee
AirTouch Communications, Inc. (AirTouch)
Alabama Public Service Commission (Alabama Commission)
Alaska Telephone Association (Alaska Tel. Ass'n)
Alaska Public Utilities Commission (Alaska Commission)
Alliance for Public Technology
Allied Association Partners, LP & Geld Information Systems (Allied Ass'n)
ALLTEL Telephone Services Corporation (ALLTEL)
American Communications Services, Inc. (ACSI)
American Foundation for the Blind
American Mobile Telecommunications Association, Inc. (American Mobile Telecomm. Ass'n)
American Network Exchange, Inc. & U.S. Long Distance, Inc. (American Network Exchange)
American Personal Communications
American Petroleum Institute
American Public Communications Council
American Public Power Association (APPA)
America's Carriers Telecommunication Association (ACTA)
Ameritech
Anchorage Telephone Utility (Anchorage Tel. Utility)
Arch Communications Group, Inc. (Arch)
Arizona Corporation Commission (Arizona Commission)
Association for Study of Afro-American Life and History, Inc. (ASALH)
Association for Local Telecommunications Services (ALTS)
Association of Telemessaging Services International
AT&T Corp. (AT&T)
Attorneys General of Connecticut, Delaware, Illinois, Iowa, Massachusetts, Michigan, Minnesota, Missouri, New York, North Dakota, Pennsylvania, West Virginia and Wisconsin (Attorneys General)
Bay Springs Telephone Co., Crockett Telephone Co., National Telephone Company of Alabama, Peoples Telephone Company, Roanoke Telephone Co. & West Tennessee Telephone Company (Bay Springs, *et al.*)
Black Data Processing Associates
Black Data Processors Association (Black Data Processors Ass'n)
Bell Atlantic Telephone Companies (Bell Atlantic)
Bell Atlantic NYNEX Mobile, Inc. (Bell Atlantic NYNEX Mobile)
BellSouth Corporation, Bell Enterprises, Inc., Bellsouth Telecommunications, Inc. (BellSouth)
Bogue, Kansas
Buckeye Cablevision, Inc. (Buckeye Cablevision)

Cable & Wireless, Inc. (Cable & Wireless)
Cellular Telecommunications Industry Association (CTIA)
Celpage, Inc. (Celpage)
Centennial Cellular Corp.
Chrysler Minority Dealers Association (Chrysler Minority Dealers Ass'n)
Cincinnati Bell Telephone Company (Cincinnati Bell)
Citizens Utilities Company (Citizens Utilities)
Classic Telephone, Inc. (Classic Tel.)
Colorado Independent Telephone Association (Colorado Independent Tel. Ass'n)
Colorado Public Utilities Commission (Colorado Commission)
COMAV, Corp. (COMAV)
Comcast Cellular Communications, Inc. (Comcast Cellular)
Comcast Corporation (Comcast)
Communications and Energy Dispute Resolution Associates (CEDRA)
Competition Policy Institute
Competitive Telecommunications Association (CompTel)
Connecticut Department of Public Utility Control (Connecticut Commission)
Consumer Federation of America & Consumers Union (CFA/CU)
Consumer Project on Technology on Interconnection & Unbundling (Consumer Project)
Continental Cablevision, Inc. (Continental)
Cox Communications, Inc. (Cox)
Defense, Secretary of
DeSoto County, Mississippi Economic Development Council
District of Columbia Public Service Commission (District of Columbia Commission)
Economides, Nicholas (N. Economides)
Ericsson Corporation, The (Ericsson)
Excel Telecommunications, Inc. (Excel)
Florida Public Service Commission (Florida Commission)
Fred Williamson & Associates, Inc. (F. Williamson)
Frontier Corporation (Frontier)
General Communication, Inc. (GCI)
General ServicesAdministration/Department of Defense (GSA/DOD)
Georgia Public Service Commission (Georgia Commission)
Greater Washington Urban League
GST Telecom, Inc. (GST)
GTE Service Corporation (GTE)
Guam Telephone Authority
GVNW Inc./Management (GVNW)
Hart Engineers/Robert A. Hart, IV (Hart Engineers)
Hawaii Public Utilities Commission (Hawaii Commission)
Home Telephone Company, Inc. (Home Tel.)
Hyperion Telecommunications, Inc. (Hyperion)
Idaho Public Utilities Commission (Idaho Commission)
Illinois Commerce Commission (Illinois Commission)

Illinois Independent Telephone Association (Illinois Ind. Tel. Ass'n)
Independent Cable & Telecommunications Association (Ind. Cable & Telecomm. Ass'n)
Independent Data Communications Manufacturers Association (IDCMA)
Indiana Utility Regulatory Commission Staff (Indiana Commission Staff)
Information Technology Industry Council (ITIC)
Intelcom Group (U.S.A.), Inc. (Intelcom)
Intermedia Communications, Inc. (Intermedia)
International Communications Association (Intl. Comm. Ass'n)
Iowa Utilities Board (Iowa Commission)
John Staurulakis, Inc. (J. Staurulakis)
Joint Consumer Advocates
Jones Intercable, Inc. (Jones Intercable)
Justice, U. S. Department of (DoJ)
Kansas Corporation Commission (Kansas Commission)
Kentucky Public Service Commission (Kentucky Commission)
Koch, Richard N. (R. Koch)
LCI International Telecom Corp. (LCI)
LDDS Worldcom (LDDS)
Lincoln Telephone & Telegraph Company (Lincoln Tel.)
Louisiana Public Service Commission (Louisiana Commission)
Lucent Technologies, Inc. (Lucent)
Margaretville Telephone Co., Inc. (Margaretville Tel.)
Maryland Public Service Commission (Maryland Commission)
Massachusetts Assistive Technology Partnership Center World Institute on Disability, Alliance for Technology Access, Trace Research and Development Center, CPB/WGBH National Center For Accessible Media (Mass. Assistive Tech. Partnership, *et al.*)
Massachusetts, Commonwealth of Department of Public Utilities (Mass. Commission)
Massachusetts, Commonwealth of, Office of Attorney General (Mass. Attorney General)
Matanuska Telephone Association, Inc. (Matanuska Tel.)
MCI
Metricom, Inc. (Metricom)
MFS
Michigan Exchange Carriers Association (MECA)
Michigan, Illinois, and Texas Communities, *et al.*
Michigan Public Service Commission Staff (Michigan Commission Staff)
Minnesota Independent Coalition (Minnesota Independent Coalition)
Minnesota Public Utilities Commission (Minnesota Commission)
Missouri Public Service Commission (Missouri Commission)
Missouri Public Service Commissioner, Harold Crumpton (Missouri Commissioner)
Mobilemedia Communications, Inc. (Mobilemedia)
Motorola Satellite Communications, Inc. and U.S. Leo Services, Inc. (Motorola)
Municipal Utilities
National Association of the Deaf
National Association of Development Organizations, Gray Panthers, United Seniors Health

Cooperative, United Homeowners Association, National Hispanic Council on Aging, National Trust/Trustnet, National Association of Commissions for Women, National Council of Senior Citizens (NADO, *et al.*)
National Association of Regulatory Utility Commissioners (NARUC)
National Association of State Utility Consumer Advocates (National Ass'n of State Utility Advocates)
National Bar Association (National Bar Ass'n)
National Cable Television Association, Inc. (NCTA)
National Exchange Carrier Association, Inc. (NECA)
National League of Cities & National Association of Telecommunications Officers and Advisors (NLC/NATOA)
National Private Telecommunications Association
National Telecommunications & Information Administration (NTIA)
National Wireless Resellers Association (National Wireless Resellers Ass'n)
Nebraska Rural Development Commission
Network Reliability Council, Secretariat of Second (Network Reliability Council)
New Hampshire Public Utilities Commission, New Mexico State Corporation Commission, Utah Division of Public Utilities, Vermont Public Service Board, and Vermont Department of Public Service (New Hampshire Commission, *et al.*)
New Jersey Cable Telecommunications Association, South Carolina Cable Television Association & Texas Cable Telecommunications Association (New Jersey Cable Ass'n, *et al.*)
New Jersey, Staff of Board of Public Utilities (New Jersey Commission Staff)
New York State Consumer Protection Board (New York Consumer Protection Board)
New York State Department of Public Service (New York Commission)
Nextel Communications, Inc. (Nextel)
NEXTLINK Communications, L.L.C. (NEXTLINK)
North Carolina Utility Commission Public Staff (North Carolina Commission Staff)
North Dakota Public Service Commission (North Dakota Commission)
Northern Telecom, Inc. (Nortel)
NYNEX Telephone Companies (NYNEX)
Ohio Public Utilities Commission (Ohio Commission)
Office of the Ohio Consumers' Counsel (Ohio Consumers' Counsel)
Oklahoma Corporation Commission (Oklahoma Commission)
Omnipoint Corporation (Omnipoint)
Optel, Inc. (Optel)
Oregon Public Utility Commission (Oregon Commission)
Pacific Telesis Group (PacTel)
Paging Network, Inc. (PageNet)
Pennsylvania Public Utility Commission (Pennsylvania Commission)
People of the State of California and the Public Utility Commission of the State of California (California Commission)
Personal Communications Industry Association (PCIA)
ProNet Inc. (ProNet)

Puerto Rico Telephone Company (Puerto Rico Tel.)
Roseville Telephone Company (Roseville Tel.)
Rural Telephone Coalition (Rural Tel. Coalition)
SBC Communications Inc. (SBC)
Scherers Communications Group, Inc. (SCG)
Small Business Administration, U.S. (SBA)
Small Cable Business Association (SCBA)
SDN Users Association
South Carolina Public Service Commission (South Carolina Commission)
Southern New England Telephone Company (SNET)
Southwestern Bell Telephone Company (SWBT)
Sprint Corporation (Sprint)
Sprint Spectrum & American Personal Communications (Sprint/APC)
State of Maine Public Utilities Commission, State of Montana Public Service Commission, State of Nebraska Public Service Commission, State of New Hampshire Public Utilities Commission, State of New Mexico State Corporation Commission, State of Utah Public Service Commission and Division of Public Utilities, State of Vermont Department of Public Service and Public Service Board, and Public Utilities Commission of South Dakota (Maine Commission, *et al.*)
TCA, Inc. (TCA)
TDS Telecommunications Corporation (TDS)
Telecommunication Industries Analysis Project
Telecommunications Carriers for Competition (TCC)
Tele-Communications, Inc. (TCI)
Telecommunications Industry Association (TIA)
Telecommunications Ratepayers Association for Cost-Based and Equitable Rates (TRACER)
Telecommunications Resellers Association (Telecomm. Resellers Ass'n)
Telefonica Larga Distancia de Puerto Rico, Inc. (TLD)
Teleport Communications Group, Inc. (Teleport)
Texas Office of Public Utility Counsel (Texas Public Utility Counsel)
Texas, Public Utilities Commission (Texas Commission)
Texas Statewide Telephone Cooperative, Inc.
Texas Telephone Association (Texas Tel. Ass'n)
Time Warner Communications Holdings, Inc. (Time Warner)
Unicom, Inc. (Unicom)
United Calling Network, Inc. (United Calling Network)
United Cerebral Palsy Association
United States Telephone Association (USTA)
USTN Services, Inc. (USTN)
U.S. Network Corporation (U.S. Network)
U S West, Inc. (U S West)
Utah Division of Public Utilities
UTC

Utilex, Inc. (Utilex)
Vanguard Cellular Systems, Inc. (Vanguard)
Vartec Telecom, Inc., Transtel, Telephone Express, CGI, & CommuniGroup Inc. of Mississippi (Vartec, *et al.*)
Virginia State Corporation Commission Staff (Virginia Commission Staff)
Washington Independent Telephone Association (Wash. Ind. Tel. Ass'n)
Washington Utilities and Transportation Commission (Washington Commission)
Western Alliance
WinStar Communications, Inc. (WinStar)
Wisconsin, Public Service Commission (Wisconsin Commission)
Wyoming Public Service Commission (Wyoming Commission)

List Of Commenters in CC Docket No. 95-185

360 Degree Communications Co. (360 Degrees)
AirTouch Communications, Inc. (Airtouch)
Alaska 3 Cellular Corporation (Alaska CellularOne)
Alaska Telephone Association (ATA)
Alliance of Wireless Service Providers (Alliance)
Allied Personal Communications Industry Association of California (Allied)
ALLTEL Corporation (ALLTEL)
American Mobil Telecommunications Association (AMTA)
America's Carriers Telecommunications Association (ACTA)
American Personal Communications/Sprint Spectrum (APC/Sprint)
Ameritech
Anchorage Telephone Utility (ATU)
Arch Communications Group, Inc. (Arch)
AT&T Corporation (AT&T)
Bell Atlantic
Bell Atlantic Nynex Mobile (Bell Atlantic-NYNEX)
BellSouth Corporation (BellSouth)
State of California & the Public Utilities Commission (CPUC)
Cellular Communications of Puerto Rico, Inc. (CCPR)
Cellular Mobile Systems of St. Cloud G.P. (CMS)
Cellular Resellers Association (Cellular Resellers)
Cellular Telecommunications Industry Association (CTIA)
Celpage, Inc. (Celpage)
Centennial Cellular Corporation (Centennial)
Century Cellunet, Inc. (Century Cellunet)
Cincinnati Bell
CMT Partners (CMT)
Comcast Corporation (Comcast)
Competitive Telecommunications Association (CompTel)
Concord Telephone Company (Concord)
Connecticut Department of Public Utility (Connecticut)
Cox Enterprises, Inc. (Cox)
Florida Cellular RSA L.P. (Florida Cellular)
Frontier Corporation (Frontier)
GO Communications Corp. (GO)
General Services Administration (GSA)
GTE Services Corporation (GTE)
GVNW Inc., Management (GVNW)
Hart Engineers and 21st Century Telesis, Inc. (Hart Engineers)
Home Telephone Company, Inc. (HomeTel)
ICO Global Communications (ICO)
Illinois Commerce Commission (Illinois)

Illinois Independent Telephone Association (Illinois Ind. Tel. Assoc.)
Illinois Telephone Association (Illinois Telephone Assoc.)
John Staurulakis, Inc. (JSI)
LDDS WorldCom (LDDS WorldCom)
MCI Telecommunications Corp. (MCI)
MFS Communications Company, Inc. (MFS)
Mercury Cellular & Paging (Mercury)
Mountain Solutions
National Association of Regulatory Utility Commissioners (NARUC)
National Exchange Carrier Association (NECA)
National Telephone Cooperative Association (NTCA)
New Par
New York State Department of Public Service (New York)
Nextel Communications, Inc. (Nextel)
North Carolina 4 Cellular L.P. (North Carolina Cellular)
NYNEX Telephone Companies (NYNEX)
Public Utilities Commission of Ohio (Ohio)
Omnipoint Corporation (Omnipoint)
OPASTCO
Pacific Bell, Pacific Bell Mobile Services, Nevada Bell (Pacific Bell)
Paging Network, Inc. (PageNet)
Personal Communications Industry Association (PCIA)
Point Communications Company (Point)
Poka Lambro Telephone Cooperative (Poka Lambro)
Puerto Rico Telephone Company (PRTC)
Rural Cellular Association (RCA)
Rural Cellular Corporation (RCC)
SBC Communications, Inc. (SBC)
Smithville Telephone Company (Smithville)
Southeast Telephone Company (Southeast Telephone)
Sprint Corporation (Sprint)
Sprint Spectrum and American Personal Communications (Sprint/APC)
Telecommunications Resellers Association (TRA)
Teleport Communications Group (Teleport)
Time Warner Communications Holdings, Inc. (Time Warner)
Telecommunications Ratepayers Association for Cost-Based and Equitable Rates (TRACER)
Union Telephone Company (Union)
United States Telephone Association (USTA)
US West, Inc. (US West)
Vanguard Cellular Systems, Inc. (Vanguard)
Western Radio Services Co., Inc. (Western)
Western Wireless Corporation (Western Wireless)
Westlink Company (Westlink)

List of Commenters in CC Docket No. 91-346

Ad Hoc Telecommunications Users Committee (Ad Hoc)
Allnet Communication Services, Inc. (Allnet)
American Telephone and Telegraph Company (AT&T)
Ameritech Operating Companies (Ameritech)
Bell Atlantic Telephone Companies (Bell Atlantic)
BellSouth Corporation (BellSouth)
Cincinnati Bell Telephone (Cincinnati Bell)
Ericsson Corporation (Ericsson)
General Services Administration (GSA)
Geonet
GTE Service Corporation (GTE)
Information Technology Association of America (ITAA)
Joint Filers (includes Bell Atlantic, BellSouth, GTE, Lincoln, Pacific Bell, Rochester, SNET, and US WEST)
MCI Telecommunications Corporation (MCI)
National Communications System (NCS)
Nextel Communications, Inc. (Nextel)
North American Telecommunications Association (NATA)
Northern Telecom Inc. (Northern Telecom)
NYNEX Telephone Companies (NYNEX)
Pacific Bell and Nevada Bell (Pacific Bell)
Pacific Telesis Corporation (Pactel)
Services-oriented Open Network Technologies, Inc. (SONetech)
Siemens Stromberg-Carlson (Siemens)
Southern New England Telephone Company (SNET)
Southwestern Bell Corporation (SWBT)
Sprint
Telecommunications Industry Association (TIA)
Teleport Communications Group (Teleport)
Teloquent Communications Corporation (Teloquent)
United and Central Telephone Companies (United and Central)
United States Telephone Association (USTA)
US WEST Communications, Inc. (US WEST)

APPENDIX B - Final Rules

AMENDMENTS TO THE CODE OF FEDERAL REGULATIONS

1. Part 1 of Title 47 of the Code of Federal Regulations (C.F.R.) is amended as follows:

PART 1 -- PRACTICE AND PROCEDURE

2. The table of contents of part 1 is revised to read as follows:

* * * * *

Subpart J - Pole Attachment Complaint Procedures

1.1401	**Purpose.**
1.1402	**Definitions.**
1.1403	**Duty to provide access; modifications; notice of removal, increase or modification; petition for temporary stay.**
1.1404	**Complaint.**
1.1405	**File numbers.**
1.1406	**Dismissal of complaints.**
1.1407	**Response and reply.**
1.1408	**Number of copies and form of pleadings.**
1.1409	**Commission consideration of the complaint.**
1.1410	**Remedies.**
1.1411	**Meetings and hearings.**
1.1412	**Enforcement.**
1.1413	**Forfeiture.**
1.1414	**State certification.**
1.1415	**Other orders.**
1.1416	**Imputation of rates; modification costs.**

* * * * *

3. The authority citation for part 1 is revised to read as follows:

AUTHORITY: 47 U.S.C. 151, 154, 251, 252, 303, and 309(j) unless otherwise noted.

4. Section 1.1401 is revised to read as follows:

§ 1.1401 Purpose.

The rules and regulations contained in subpart J of this part provide complaint and enforcement procedures to ensure that telecommunications carriers and cable system operators have nondiscriminatory access to utility poles, ducts, conduits, and rights-of-way on rates, terms,

and conditions that are just and reasonable.

5. Section 1.1402 is amended by revising paragraph (d) to read as follows:

§ 1.1402 Definitions.

• • • • •

(d) The term *complaint* means a filing by a cable television system operator, a cable television system association, a utility, an association of utilities, a telecommunications carrier, or an association of telecommunications carriers alleging that it has been denied access to a utility pole, duct, conduit, or right-of-way in violation of this subpart and/or that a rate, term, or condition for a pole attachment is not just and reasonable.

• • • • •

6. Section 1.1403 is amended by retitling the section, by amending paragraphs (a) and (b) and redesignating them as paragraphs (c) and (d), respectively, and by adding new paragraphs (a) and (b) to read as follows:

§ 1.1403 Duty to provide access; modifications; notice of removal, increase or modification; petition for temporary stay.

(a) A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it. Notwithstanding this obligation, a utility may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity or for reasons of safety, reliability and generally applicable engineering purposes.

(b) Requests for access to a utility's poles, ducts, conduits or rights-of-way by a telecommunications carrier or cable operator must be in writing. If access is not granted within 45 days of the request for access, the utility must confirm the denial in writing by the 45th day. The utility's denial of access shall be specific, shall include all relevant evidence and information supporting its denial, and shall explain how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability or engineering standards.

(c) A utility shall provide a cable television system operator or telecommunications carrier no less than 60 days written notice prior to: (1) removal of facilities or termination of any service to those facilities, such removal or termination arising out of a rate, term or condition of the cable television system operator's of telecommunications carrier's pole attachment agreement, or (2) any increase in pole attachment rates; or (3) any modification of facilities other than routine maintenance or modification in response to emergencies.

(d) A cable television system operator or telecommunications carrier may file a

"Petition for Temporary Stay" of the action contained in a notice received pursuant to paragraph (c) of this section within 15 days of receipt of such notice. Such submission shall not be considered unless it includes, in concise terms, the relief sought, the reasons for such relief, including a showing of irreparable harm and likely cessation of cable television service or telecommunication service, a copy of the notice, and certification of service as required by § 1.1404(b) of this subpart. The named respondent may file an answer within 7 days of the date the Petition for Temporary Stay was filed. No further filings under this section will be considered unless requested or authorized by the Commission and no extensions of time will be granted unless justified pursuant to § 1.46.

7. Section 1.1404 is amended by revising paragraphs (b) and (c) and by adding new paragraph (k) to read as follows:

§ 1.1404 Complaint.

* * * * *

(b) The complaint shall be accompanied by a certification of service on the named respondent, and each of the Federal, State, and local governmental agencies that regulate any aspect of the services provided by the complainant or respondent.

(c) In a case where it is claimed that a rate, term, or condition is unjust or unreasonable, the complaint shall contain a statement that the State has not certified to the Commission that it regulates the rates, terms and conditions for pole attachments. The complaint shall include a statement that the utility is not owned by any railroad, any person who is cooperatively organized or any person owned by the Federal Government or any State.

* * * * *

(k) In a case where a cable television system operator or telecommunications carrier claims that it has been denied access to a pole, duct, conduit or right-of-way despite a request made pursuant to section 47 U.S.C. § 224(f), the complaint shall be filed within 30 days of such denial. In addition to meeting the other requirements of this section, the complaint shall include the data and information necessary to support the claim, including:

(1) The reasons given for the denial of access to the utility's poles, ducts, conduits and rights-of-way;

(2) The basis for the complainant's claim that the denial of access is improper;

(3) The remedy sought by the complainant;

(4) A copy of the written request to the utility for access to its poles, ducts, conduits or rights-of-way;

(5) A copy of the utility's response to the written request including all information given by the utility to support its denial of access. A complaint alleging improper denial of access will not be dismissed if the complainant is unable to obtain a utility's written response, or if the utility denies the complainant any other information needed to establish a

prima facie case.

8. Section 1.1409 is amended by revising paragraphs (b) and (d) to read as follows:

§ 1.1409 Commission consideration of the complaint.

• • • • •

(b) The complainant shall have the burden of establishing a *prima facie* case that the rate, term, or condition is not just and reasonable or that the denial of access violates 47 U.S.C. § 224(f). If, however, a utility argues that the proposed rate is lower than its incremental costs, the utility has the burden of establishing that such rate is below the statutory minimum just and reasonable rate. In a case involving a denial of access, the utility shall have the burden of proving that the denial was lawful, once a *prima facie* case is established by the complainant.

• • • • •

(d) The Commission shall deny the complaint if it determines that the complainant has not established a *prima facie* case, or that the rate, term or condition is just and reasonable, or that the denial of access was lawful.

• • • • •

9. Section 1.1416 is amended by retitling the section and by amending paragraph (b) to read as follows:

§ 1.1416 Imputation of rates; modification costs.

• • • • •

(b) The costs of modifying a facility shall be borne by all parties that obtain access to the facility as a result of the modification and by all parties that directly benefit from the modification. Each party described in the preceding sentence shall share proportionately in the cost of the modification. A party with a preexisting attachment to the modified facility shall be deemed to directly benefit from a modification if, after receiving notification of such modification as provided in subpart J of this part, it adds to or modifies its attachment. Notwithstanding the foregoing, a party with a preexisting attachment to a pole, conduit, duct or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment if such rearrangement or replacement is necessitated solely as a result of an additional attachment or the modification of an existing attachment sought by another party. If a party makes an attachment to the facility after the completion of the modification, such party shall share proportionately in the cost of the modification if such modification rendered possible the added attachment.

10. Part 20 of Title 47 of the Code of Federal Regulations (C.F.R.) is amended as follows:

PART 20 -- COMMERCIAL MOBILE RADIO SERVICES

11. The authority citation for part 20 is revised to read as follows:

AUTHORITY: Secs. 4, 251-2, 303, and 332, 48 Stat. 1066, 1062, as amended; 47 U.S.C. 154, 251-4, 303, and 332 unless otherwise noted.

12. Section 20.11 is amended by adding paragraph (c) to read as follows:

§ 20.11 Interconnection to facilities of local exchange carriers.

* * * * *

(c) Local exchange carriers and commercial mobile radio service providers shall also comply with applicable provisions of part 51 of this chapter.

13. Part 51 of Title 47 of the Code of Federal Regulations (C.F.R.) is added to read as follows:

PART 51 -- INTERCONNECTION

Subpart A - General information

Sec.

51.1 Basis and purpose.
51.3 Applicability to negotiated agreements.
51.5 Terms and definitions.

Subpart B - Telecommunications carriers

51.100 General duty.

Subpart C - Obligations of all local exchange carriers

51.201 Resale.
51.203 Number portability.
51.219 Access to rights of way.
51.221 Reciprocal compensation.
51.223 Application of additional requirements.

Subpart D - Additional obligations of incumbent local exchange carriers

51.301 Duty to negotiate.
51.303 Preexisting agreements.
51.305 Interconnection.

51.307 Duty to provide access on an unbundled basis to network elements.
51.309 Use of unbundled network elements.
51.311 Nondiscriminatory access to unbundled network elements.
51.313 Just, reasonable and nondiscriminatory terms and conditions for the provision of unbundled network elements.
51.315 Combination of unbundled network elements.
51.317 Standards for identifying network elements to be made available.
51.319 Specific unbundling requirements.
51.321 Methods of obtaining interconnection and access to unbundled elements under section 251 of the Act.
51.323 Standards for physical collocation and virtual collocation.

Subpart E - Exemptions, suspensions, and modifications of requirements of section251 of the Act.

51.401 State authority.
51.403 Carriers eligible for suspension or modification under section 251(f)(2) of the Act.
51.405 Burden of proof.

Subpart F - Pricing of interconnection and unbundled elements

51.501 Scope.
51.503 General pricing standard.
51.505 Forward-looking economic cost.
51.507 General rate structure standard.
51.509 Rate structure standards for specific elements.
51.511 Forward-looking economic cost per unit.
51.513 Proxies for forward-looking economic cost.
51.515 Application of access charges.

Subpart G - Resale

51.601 Scope of resale rules.
51.603 Resale obligation of all local exchange carriers.
51.605 Additional obligations of incumbent local exchange carriers.
51.607 Wholesale pricing standard.
51.609 Determination of avoided retail costs.
51.611 Interim wholesale rates.
51.613 Restrictions on resale.
51.615 Withdrawal of services.
51.617 Assessment of end user common line charge on resellers.

Subpart H - Reciprocal compensation for transport and termination of local telecommunications traffic

51.701 Scope of transport and termination pricing rules.
51.703 Reciprocal compensation obligation of LECs.
51.705 Incumbent LECs' rates for transport and termination.
51.707 Default proxies for incumbent LECs' transport and termination rates.
51.709 Rate structure for transport and termination.
51.711 Symmetrical reciprocal compensation.
51.713 Bill-and-keep arrangements for reciprocal compensation.
51.715 Interim transport and termination pricing.
51.717 Renegotiation of existing non-reciprocal arrangements.

Subpart I - Procedures for implementation of section 252 of the Act.

51.801 Commission action upon a state commission's failure to act to carry out its responsibility under section 252 of the Act.
51.803 Procedures for Commission notification of a state commission's failure to act.
51.805 The Commission's authority over proceedings and matters.
51.807 Arbitration and mediation of agreements by the Commission pursuant to section 252(e)(5) of the Act.
51.809 Availability of provisions of agreements to other telecommunications carriers under section 252(i) of the Act.

AUTHORITY: Sections 1-5, 7, 201-05, 218, 225-27, 251-54, 271, 48 Stat. 1070, as amended, 1077; 47 U.S.C. 151-55, 157, 201-05, 218, 225-27, 251-54, 271, unless otherwise noted.

Subpart A - General Information.

§ 51.1 Basis and purpose.

(a) *Basis*. These rules are issued pursuant to the Communications Act of 1934, as amended.

(b) *Purpose*. The purpose of these rules is to implement sections 251 and 252 of the Communications Act of 1934, as amended, 47 U.S.C. 251 and 252.

§ 51.3 Applicability to negotiated agreements.

To the extent provided in section 252(e)(2)(A) of the Act, a state commission shall have authority to approve an interconnection agreement adopted by negotiation even if the terms of the agreement do not comply with the requirements of this part.

§ 51.5 Terms and definitions.

Terms used in this part have the following meanings:

Act. The Communications Act of 1934, as amended.

Advanced intelligent network. "Advanced Intelligent Network" is a telecommunications network architecture in which call processing, call routing, and network management are provided by means of centralized databases located at points in an incumbent local exchange carrier's network.

Arbitration, final offer. "Final offer arbitration" is a procedure under which each party submits a final offer concerning the issues subject to arbitration, and the arbitrator selects, without modification, one of the final offers by the parties to the arbitration or portions of both such offers. "Entire package final offer arbitration," is a procedure under which the arbitrator must select, without modification, the entire proposal submitted by one of the parties to the arbitration. "Issue-by-issue final offer arbitration," is a procedure under which the arbitrator must select, without modification, on an issue-by-issue basis, one of the proposals submitted by the parties to the arbitration.

Billing. "Billing" involves the provision of appropriate usage data by one telecommunications carrier to another to facilitate customer billing with attendant acknowledgements and status reports. It also involves the exchange of information between telecommunications carriers to process claims and adjustments.

Commercial Mobile Radio Service (CMRS). "CMRS" has the same meaning as that term is defined in § 20.3 of this chapter.

Commission. "Commission" refers to the Federal Communications Commission.

Directory assistance service. "Directory assistance service" includes, but is not limited to, making available to customers, upon request, information contained in directory listings.

Directory listings. "Directory listings" are any information: (1) identifying the listed names of subscribers of a telecommunications carrier and such subscriber's telephone numbers, addresses, or primary advertising classifications (as such classifications are assigned at the time of the establishment of such service), or any combination of such listed names, numbers, addresses or classifications; and (2) that the telecommunications carrier or an affiliate has published, caused to be published, or accepted for publication in any directory format.

Downstream database. A "downstream database" is a database owned and operated by an individual carrier for the purpose of providing number portability in conjunction with other functions and services.

Equipment necessary for interconnection or access to unbundled network elements. For

purposes of section 251(c)(2) of the Act, the equipment used to interconnect with an incumbent local exchange carrier's network for the transmission and routing of telephone exchange service, exchange access service, or both. For the purposes of section 251(c)(3) of the Act, the equipment used to gain access to an incumbent local exchange carrier's unbundled network elements for the provision of a telecommunications service.

Incumbent Local Exchange Carrier (Incumbent LEC). With respect to an area, the local exchange carrier that: (1) on February 8, 1996, provided telephone exchange service in such area; and (2) (i) on February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to § 69.601(b) of this chapter; or (ii) is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in clause (i) of this paragraph.

Interconnection. "Interconnection" is the linking of two networks for the mutual exchange of traffic. This term does not include the transport and termination of traffic.

Local Exchange Carrier (LEC). A "LEC" is any person that is engaged in the provision of telephone exchange service or exchange access. Such term does not include a person insofar as such person is engaged in the provision of a commercial mobile service under section 332(c) of the Act, except to the extent that the Commission finds that such service should be included in the definition of the such term.

Maintenance and repair. "Maintenance and repair" involves the exchange of information between telecommunications carriers where one initiates a request for maintenance or repair of existing products and services or unbundled network elements or combination thereof from the other with attendant acknowledgements and status reports.

Meet point. A "meet point" is a point of interconnection between two networks, designated by two telecommunications carriers, at which one carrier's responsibility for service begins and the other carrier's responsibility ends.

Meet point interconnection arrangement. A "meet point interconnection arrangement" is an arrangement by which each telecommunications carrier builds and maintains its network to a meet point.

Network element. A "network element" is a facility or equipment used in the provision of a telecommunications service. Such term also includes, but is not limited to, features, functions, and capabilities that are provided by means of such facility or equipment, including but not limited to, subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.

Operator services. "Operator services" are any automatic or live assistance to a consumer to arrange for billing or completion of a telephone call. Such services include, but are not limited to, busy line verification, emergency interrupt, and operator-assisted directory assistance services.

Physical collocation. "Physical collocation" is an offering by an incumbent LEC that enables a requesting telecommunications carrier to:

(1) place its own equipment to be used for interconnection or access to unbundled network elements within or upon an incumbent LEC's premises;

(2) use such equipment to interconnect with an incumbent LEC's network facilities for the transmission and routing of telephone exchange service, exchange access service, or both, or to gain access to an incumbent LEC's unbundled network elements for the provision of a telecommunications service;

(3) enter those premises, subject to reasonable terms and conditions, to install, maintain, and repair equipment necessary for interconnection or access to unbundled elements; and

(4) obtain reasonable amounts of space in an incumbent LEC's premises, as provided in this part, for the equipment necessary for interconnection or access to unbundled elements, allocated on a first-come, first-served basis.

Premises. "Premises" refers to an incumbent LEC's central offices and serving wire centers, as well as all buildings or similar structures owned or leased by an incumbent LEC that house its network facilities, and all structures that house incumbent LEC facilities on public rights-of-way, including but not limited to vaults containing loop concentrators or similar structures.

Pre-ordering and ordering. "Pre-ordering and ordering" includes the exchange of information between telecommunications carriers about current or proposed customer products and services or unbundled network elements or some combination thereof.

Provisioning. "Provisioning" involves the exchange of information between telecommunications carriers where one executes a request for a set of products and services or unbundled network elements or combination thereof from the other with attendant acknowledgements and status reports.

Rural telephone company. A "rural telephone company" is a LEC operating entity to the extent that such entity:

(1) provides common carrier service to any local exchange carrier study area that does not include either:

(i) any incorporated place of 10,000 inhabitants or more, or any part thereof, based on the most recently available population statistics of the Bureau of the Census; or

(ii) any territory, incorporated or unincorporated, included in an urbanized area, as defined by the Bureau of the Census as of August 10, 1993;

(2) provides telephone exchange service, including exchange access, to fewer than 50,000 access lines;

(3) provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or

(4) has less than 15 percent of its access lines in communities of more than 50,000

on February 8, 1996.

Service control point. A "service control point" is a computer database in the public switched network which contains information and call processing instructions needed to process and complete a telephone call.

Service creation environment. A "service creation environment" is a computer containing generic call processing software that can be programmed to create new advanced intelligent network call processing services.

Signal transfer point. A "signal transfer point" is a packet switch that acts as a routing hub for a signaling network and transfers messages between various points in and among signaling networks.

State commission. A "state commission" means the commission, board, or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers. As referenced in this part, this term may include the Commission if it assumes the responsibility of the state commission, pursuant to section 252(e)(5) of the Act. This term shall also include any person or persons to whom the state commission has delegated its authority under section 251 and 252 of the Act.

State proceeding. A "state proceeding" is any administrative proceeding in which a state commission may approve or prescribe rates, terms, and conditions including, but not limited to, compulsory arbitration pursuant to section 252(b) of the Act, review of a Bell operating company statement of generally available terms pursuant section 252(f) of the Act, and a proceeding to determine whether to approve or reject an agreement adopted by arbitration pursuant to section 252(e) of the Act.

Technically feasible. Interconnection, access to unbundled network elements, collocation, and other methods of achieving interconnection or access to unbundled network elements at a point in the network shall be deemed technically feasible absent technical or operational concerns that prevent the fulfillment of a request by a telecommunications carrier for such interconnection, access, or methods. A determination of technical feasibility does not include consideration of economic, accounting, billing, space, or site concerns, except that space and site concerns may be considered in circumstances where there is no possibility of expanding the space available. The fact that an incumbent LEC must modify its facilities or equipment to respond to such request does not determine whether satisfying such request is technically feasible. An incumbent LEC that claims that it cannot satisfy such request because of adverse network reliability impacts must prove to the state commission by clear and convincing evidence that such interconnection, access, or methods would result in specific and significant adverse network reliability impacts.

Telecommunications carrier. A "telecommunications carrier" is any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226 of the Act). A telecommunications carrier shall be treated as a common carrier under the Act only to the extent that it is engaged in

providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage. This definition includes CMRS providers, interexchange carriers (IXCs) and, to the extent they are acting as telecommunications carriers, companies that provide both telecommunications and information services. Private Mobile Radio Service providers are telecommunications carriers to the extent they provide domestic or international telecommunications for a fee directly to the public.

Virtual collocation. "Virtual collocation" is an offering by an incumbent LEC that enables a requesting telecommunications carrier to:

(1) designate or specify equipment to be used for interconnection or access to unbundled network elements to be located within or upon an incumbent LEC's premises, and dedicated to such telecommunications carrier's use;

(2) use such equipment to interconnect with an incumbent LEC's network facilities for the transmission and routing of telephone exchange service, exchange access service, or both, or for access to an incumbent LEC's unbundled network elements for the provision of a telecommunications service; and

(3) electronically monitor and control its communications channels terminating in such equipment.

Subpart B - Telecommunications Carriers.

§ 51.100 General duty.

(a) Each telecommunications carrier has the duty:

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) to not install network features, functions, or capabilities that do not comply with the guidelines and standards as provided in the Commission's rules or section 255 or 256 of the Act.

(b) A telecommunication carrier that has interconnected or gained access under sections 251(a)(1), 251(c)(2), or 251(c)(3) of the Act, may offer information services through the same arrangement, so long as it is offering telecommunications services through the same arrangement as well.

Subpart C - Obligations of All Local Exchange Carriers.

§ 51.201 Resale.

The rules governing resale of services by an incumbent LEC are set forth in subpart G of this part.

§ 51.203 Number portability.

The rules governing number portability are set forth in part 52, subpart C of this chapter.

§ 51.219 Access to rights of way.

The rules governing access to rights of way are set forth in part 1, subpart J of this chapter.

§ 51.221 Reciprocal compensation.

The rules governing reciprocal compensation are set forth in subpart H of this part.

§ 51.223 Application of additional requirements.

(a) A state may not impose the obligations set forth in section 251(c) of the Act on a LEC that is not classified as an incumbent LEC as defined in section 251(h)(1) of the Act, unless the Commission issues an order declaring that such LECs or classes or categories of LECs should be treated as incumbent LECs.

(b) A state commission, or any other interested party, may request that the Commission issue an order declaring that a particular LEC be treated as an incumbent LEC, or that a class or category of LECs be treated as incumbent LECs, pursuant to section 251(h)(2) of the Act.

Subpart D - Additional Obligations of Incumbent Local Exchange Carriers.

§ 51.301 Duty to negotiate.

(a) An incumbent LEC shall negotiate in good faith the terms and conditions of agreements to fulfill the duties established by sections 251(b) and (c) of the Act.

(b) A requesting telecommunications carrier shall negotiate in good faith the terms and conditions of agreements described in paragraph (a) of this section.

(c) If proven to the Commission, an appropriate state commission, or a court of competent jurisdiction, the following actions or practices, among others, violate the duty to negotiate in good faith:

(1) demanding that another party sign a nondisclosure agreement that precludes such party from providing information requested by the Commission, or a state commission, or in support of a request for arbitration under section 252(b)(2)(B) of the Act;

(2) demanding that a requesting telecommunications carrier attest that an agreement complies with all provisions of the Act, federal regulations, or state law;

(3) refusing to include in an arbitrated or negotiated agreement a provision that permits the agreement to be amended in the future to take into account changes in Commission or state rules;

(4) conditioning negotiation on a requesting telecommunications carrier first obtaining state certifications;

(5) intentionally misleading or coercing another party into reaching an agreement that it would not otherwise have made;

(6) intentionally obstructing or delaying negotiations or resolutions of disputes;

(7) refusing throughout the negotiation process to designate a representative with authority to make binding representations, if such refusal significantly delays resolution of issues; and

(8) refusing to provide information necessary to reach agreement. Such refusal includes, but is not limited to:

(i) refusal by an incumbent LEC to furnish information about its network that a requesting telecommunications carrier reasonably requires to identify the network elements that it needs in order to serve a particular customer; and

(ii) refusal by a requesting telecommunications carrier to furnish cost data that would be relevant to setting rates if the parties were in arbitration.

§ 51.303 Preexisting agreements.

(a) All interconnection agreements between an incumbent LEC and a telecommunications carrier, including those negotiated before February 8, 1996, shall be submitted by the parties to the appropriate state commission for approval pursuant to section 252(e) of the Act.

(b) Interconnection agreements negotiated before February 8, 1996, between Class A carriers, as defined by § 32.11(a)(1) of this chapter, shall be filed by the parties with the appropriate state commission no later than June 30, 1997, or such earlier date as the state commission may require.

(c) If a state commission approves a preexisting agreement, it shall be made available to other parties in accordance with section 252(i) of the Act and § 51.809 of this part. A state commission may reject a preexisting agreement on the grounds that it is inconsistent with the public interest, or for other reasons set forth in section 252(e)(2)(A) of the Act.

§ 51.305 Interconnection.

(a) An incumbent LEC shall provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the incumbent LEC's network:

(1) for the transmission and routing of telephone exchange traffic, exchange access traffic, or both;

(2) at any technically feasible point within the incumbent LEC's network including, at a minimum:

(i) the line-side of a local switch;

(ii) the trunk-side of a local switch;

(iii) the trunk interconnection points for a tandem switch;

(iv) central office cross-connect points;

(v) out-of-band signaling transfer points necessary to exchange traffic at these points and access call-related databases; and

(vi) the points of access to unbundled network elements as described in § 51.319 of this part;

(3) that is at a level of quality that is equal to that which the incumbent LEC provides itself, a subsidiary, an affiliate, or any other party, except as provided in paragraph (4) of this section. At a minimum, this requires an incumbent LEC to design interconnection facilities to meet the same technical criteria and service standards that are used within the incumbent LEC's network. This obligation is not limited to a consideration of service quality as perceived by end users, and includes, but is not limited to, service quality as perceived by the requesting telecommunications carrier;

(4) that, if so requested by a telecommunications carrier and to the extent technically feasible, is superior in quality to that provided by the incumbent LEC to itself or to any subsidiary, affiliate, or any other party to which the incumbent LEC provides interconnection. Nothing in this section prohibits an incumbent LEC from providing interconnection that is lesser in quality at the sole request of the requesting telecommunications carrier; and

(5) on terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of any agreement, the requirements of sections 251 and 252 of the Act, and the Commission's rules including, but not limited to, offering such terms and conditions equally to all requesting telecommunications carriers, and offering such terms and conditions that are no less favorable than the terms and conditions upon which the incumbent LEC provides such interconnection to itself. This includes, but is not limited to, the time within which the incumbent LEC provides such interconnection.

(b) A carrier that requests interconnection solely for the purpose of originating or terminating its interexchange traffic on an incumbent LEC's network and not for the purpose of providing to others telephone exchange service, exchange access service, or both, is not entitled to receive interconnection pursuant to section 251(c)(2) of the Act.

(c) Previous successful interconnection at a particular point in a network, using particular facilities, constitutes substantial evidence that interconnection is technically feasible at that point, or at substantially similar points, in networks employing substantially similar

facilities. Adherence to the same interface or protocol standards shall constitute evidence of the substantial similarity of network facilities.

(d) Previous successful interconnection at a particular point in a network at a particular level of quality constitutes substantial evidence that interconnection is technically feasible at that point, or at substantially similar points, at that level of quality.

(e) An incumbent LEC that denies a request for interconnection at a particular point must prove to the state commission that interconnection at that point is not technically feasible.

(f) If technically feasible, an incumbent LEC shall provide two-way trunking upon request.

§ 51.307 Duty to provide access on an unbundled basis to network elements.

(a) An incumbent LEC shall provide, to a requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of any agreement, the requirements of sections 251 and 252 of the Act, and the Commission's rules.

(b) The duty to provide access to unbundled network elements pursuant to section 251(c)(3) of the Act includes a duty to provide a connection to an unbundled network element independent of any duty to provide interconnection pursuant to this part and section 251(c)(2) of the Act.

(c) An incumbent LEC shall provide a requesting telecommunications carrier access to an unbundled network element, along with all of the unbundled network element's features, functions, and capabilities, in a manner that allows the requesting telecommunications carrier to provide any telecommunications service that can be offered by means of that network element.

(d) An incumbent LEC shall provide a requesting telecommunications carrier access to the facility or functionality of a requested network element separate from access to the facility or functionality of other network elements, for a separate charge.

§ 51.309 Use of unbundled network elements.

(a) An incumbent LEC shall not impose limitations, restrictions, or requirements on requests for, or the use of, unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting telecommunications carrier intends.

(b) A telecommunications carrier purchasing access to an unbundled network element may use such network element to provide exchange access services to itself in order to provide

interexchange services to subscribers.

(c) A telecommunications carrier purchasing access to an unbundled network facility is entitled to exclusive use of that facility for a period of time, or when purchasing access to a feature, function, or capability of a facility, a telecommunications carrier is entitled to use of that feature, function, or capability for a period of time. A telecommunications carrier's purchase of access to an unbundled network element does not relieve the incumbent LEC of the duty to maintain, repair, or replace the unbundled network element.

§ 51.311 Nondiscriminatory access to unbundled network elements.

(a) The quality of an unbundled network element, as well as the quality of the access to the unbundled network element, that an incumbent LEC provides to a requesting telecommunications carrier shall be the same for all telecommunications carriers requesting access to that network element, except as provided in paragraph (c) of this section.

(b) Except as provided in paragraph (c) of this section, to the extent technically feasible, the quality of an unbundled network element, as well as the quality of the access to such unbundled network element, that an incumbent LEC provides to a requesting telecommunications carrier shall be at least equal in quality to that which the incumbent LEC provides to itself. If an incumbent LEC fails to meet this requirement, the incumbent LEC must prove to the state commission that it is not technically feasible to provide the requested unbundled network element, or to provide access to the requested unbundled network element, at a level of quality that is equal to that which the incumbent LEC provides to itself.

(c) To the extent technically feasible, the quality of an unbundled network element, as well as the quality of the access to such unbundled network element, that an incumbent LEC provides to a requesting telecommunications carrier shall, upon request, be superior in quality to that which the incumbent LEC provides to itself. If an incumbent LEC fails to meet this requirement, the incumbent LEC must prove to the state commission that it is not technically feasible to provide the requested unbundled network element or access to such unbundled network element at the requested level of quality that is superior to that which the incumbent LEC provides to itself. Nothing in this section prohibits an incumbent LEC from providing interconnection that is lesser in quality at the sole request of the requesting telecommunications carrier.

(d) Previous successful access to an unbundled element at a particular point in a network, using particular facilities, is substantial evidence that access is technically feasible at that point, or at substantially similar points, in networks employing substantially similar facilities. Adherence to the same interface or protocol standards shall constitute evidence of the substantial similarity of network facilities.

(e) Previous successful provision of access to an unbundled element at a particular point in a network at a particular level of quality is substantial evidence that access is technically feasible at that point, or at substantially similar points, at that level of quality.

§ 51.313 Just, reasonable and nondiscriminatory terms and conditions for the provision of unbundled network elements.

(a) The terms and conditions pursuant to which an incumbent LEC provides access to unbundled network elements shall be offered equally to all requesting telecommunications carriers.

(b) Where applicable, the terms and conditions pursuant to which an incumbent LEC offers to provide access to unbundled network elements, including but not limited to, the time within which the incumbent LEC provisions such access to unbundled network elements, shall, at a minimum, be no less favorable to the requesting carrier than the terms and conditions under which the incumbent LEC provides such elements to itself.

(c) An incumbent LEC must provide a carrier purchasing access to unbundled network elements with the pre-ordering, ordering, provisioning, maintenance and repair, and billing functions of the incumbent LEC's operations support systems.

§ 51.315 Combination of unbundled network elements.

(a) An incumbent LEC shall provide unbundled network elements in a manner that allows requesting telecommunications carriers to combine such network elements in order to provide a telecommunications service.

(b) Except upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines.

(c) Upon request, an incumbent LEC shall perform the functions necessary to combine unbundled network elements in any manner, even if those elements are not ordinarily combined in the incumbent LEC's network, provided that such combination is:

(1) technically feasible; and

(2) would not impair the ability of other carriers to obtain access to unbundled network elements or to interconnect with the incumbent LEC's network.

(d) Upon request, an incumbent LEC shall perform the functions necessary to combine unbundled network elements with elements possessed by the requesting telecommunications carrier in any technically feasible manner.

(e) An incumbent LEC that denies a request to combine elements pursuant to paragraph (c)(1) or paragraph (d) of this section must prove to the state commission that the requested combination is not technically feasible.

(f) An incumbent LEC that denies a request to combine elements pursuant to paragraph (c)(2) of this section must prove to the state commission that the requested combination would impair the ability of other carriers to obtain access to unbundled network elements or to interconnect with the incumbent LEC's network.

§ 51.317 Standards for identifying network elements to be made available.

(a) In determining what network elements should be made available for purposes of section 251(c)(3) of the Act beyond those identified in § 51.319 of this part, a state commission shall first determine whether it is technically feasible for the incumbent LEC to provide access to a network element on an unbundled basis.

(b) If the state commission determines that it is technically feasible for the incumbent LEC to provide access to the network element on an unbundled basis, the state commission may decline to require unbundling of the network element only if:

(1) the state commission concludes that:

(i) the network element is proprietary, or contains proprietary information that will be revealed if the network element is provided on an unbundled basis; and

(ii) a requesting telecommunications carrier could offer the same proposed telecommunications service through the use of other, nonproprietary unbundled network elements within the incumbent LEC's network; or

(2) the state commission concludes that the failure of the incumbent LEC to provide access to the network element would not decrease the quality of, and would not increase the financial or administrative cost of, the telecommunications service a requesting telecommunications carrier seeks to offer, compared with providing that service over other unbundled network elements in the incumbent LEC's network.

§ 51.319 Specific unbundling requirements.

An incumbent LEC shall provide nondiscriminatory access in accordance with § 51.311 of this part and section 251(c)(3) of the Act to the following network elements on an unbundled basis to any requesting telecommunications carrier for the provision of a telecommunications service:

(a) *Local Loop*. The local loop network element is defined as a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and an end user customer premises;

(b) *Network Interface Device*.

(1) The network interface device network element is defined as a cross-connect device used to connect loop facilities to inside wiring.

(2) An incumbent LEC shall permit a requesting telecommunications carrier to connect its own local loops to the inside wiring of premises through the incumbent LEC's network interface device. The requesting telecommunications carrier shall establish this connection through an adjoining network interface device deployed by such telecommunications carrier;

(c) *Switching Capability*.

(1) Local Switching Capability.

(i) The local switching capability network element is defined as:

(A) line-side facilities, which include, but are not limited to, the connection between a loop termination at a main distribution frame and a switch line card;

(B) trunk-side facilities, which include, but are not limited to, the connection between trunk termination at a trunk-side cross-connect panel and a switch trunk card; and

(C) all features, functions, and capabilities of the switch, which include, but are not limited to:

(*1*) the basic switching function of connecting lines to lines, lines to trunks, trunks to lines, and trunks to trunks, as well as the same basic capabilities made available to the incumbent LEC's customers, such as a telephone number, white page listing, and dial tone; and

(*2*) all other features that the switch is capable of providing, including but not limited to custom calling, custom local area signaling service features, and Centrex, as well as any technically feasible customized routing functions provided by the switch.

(ii) An incumbent LEC shall transfer a customer's local service to a competing carrier within a time period no greater than the interval within which the incumbent LEC currently transfers end users between interexchange carriers, if such transfer requires only a change in the incumbent LEC's software;

(2) Tandem Switching Capability. The tandem switching capability network element is defined as:

(i) trunk-connect facilities, including but not limited to the connection between trunk termination at a cross-connect panel and a switch trunk card;

(ii) the basic switching function of connecting trunks to trunks; and

(iii) the functions that are centralized in tandem switches (as distinguished from separate end-office switches), including but not limited to call recording, the routing of calls to operator services, and signaling conversion features;

(d) *Interoffice Transmission Facilities*.

(1) Interoffice transmission facilities are defined as incumbent LEC transmission facilities dedicated to a particular customer or carrier, or shared by more than one customer or carrier, that provide telecommunications between wire centers owned by incumbent LECs or

requesting telecommunications carriers, or between switches owned by incumbent LECs or requesting telecommunications carriers.

(2) The incumbent LEC shall:

(i) provide a requesting telecommunications carrier exclusive use of interoffice transmission facilities dedicated to a particular customer or carrier, or use of the features, functions, and capabilities of interoffice transmission facilities shared by more than one customer or carrier;

(ii) provide all technically feasible transmission facilities, features, functions, and capabilities that the requesting telecommunications carrier could use to provide telecommunications services;

(iii) permit, to the extent technically feasible, a requesting telecommunications carrier to connect such interoffice facilities to equipment designated by the requesting telecommunications carrier, including, but not limited to, the requesting telecommunications carrier's collocated facilities; and

(iv) permit, to the extent technically feasible, a requesting telecommunications carrier to obtain the functionality provided by the incumbent LEC's digital cross-connect systems in the same manner that the incumbent LEC provides such functionality to interexchange carriers;

(e) *Signaling Networks and Call-Related Databases*.

(1) Signaling Networks.

(i) Signaling networks include, but are not limited to, signaling links and signaling transfer points.

(ii) When a requesting telecommunications carrier purchases unbundled switching capability from an incumbent LEC, the incumbent LEC shall provide access to its signaling network from that switch in the same manner in which it obtains such access itself.

(iii) An incumbent LEC shall provide a requesting telecommunications carrier with its own switching facilities access to the incumbent LEC's signaling network for each of the requesting telecommunications carrier's switches. This connection shall be made in the same manner as an incumbent LEC connects one of its own switches to a signal transfer point.

(iv) Under this paragraph, an incumbent LEC is not required to unbundle those signaling links that connect service control points to switching transfer points or to permit a requesting telecommunications carrier to link its own signal transfer points directly to the incumbent LEC's switch or call-related databases;

(2) Call-Related Databases.

(i) Call-related databases are defined as databases, other than operations support systems, that are used in signaling networks for billing and collection or the transmission, routing, or other provision of a telecommunications service.

(ii) For purposes of switch query and database response through a signaling network, an incumbent LEC shall provide access to its call-related databases, including, but not limited to, the Line Information Database, Toll Free Calling database, downstream number portability databases, and Advanced Intelligent Network databases, by means of physical access at the signaling transfer point linked to the unbundled database.

(iii) An incumbent LEC shall allow a requesting telecommunications carrier that has purchased an incumbent LEC's local switching capability to use the incumbent LEC's service control point element in the same manner, and via the same signaling links, as the incumbent LEC itself.

(iv) An incumbent LEC shall allow a requesting telecommunications carrier that has deployed its own switch, and has linked that switch to an incumbent LEC's signaling system, to gain access to the incumbent LEC's service control point in a manner that allows the requesting carrier to provide any call-related, database-supported services to customers served by the requesting telecommunications carrier's switch.

(v) A state commission shall consider whether mechanisms mediating access to an incumbent LEC's Advanced Intelligent Network service control points are necessary, and if so, whether they will adequately safeguard against intentional or unintentional misuse of the incumbent LEC's Advanced Intelligent Network facilities.

(vi) An incumbent LEC shall provide a requesting telecommunications carrier with access to call-related databases in a manner that complies with section 222 of the Act;

(3) Service Management Systems.

(A) A service management system is defined as a computer database or system not part of the public switched network that, among other things:

(1) interconnects to the service control point and sends to that service control point the information and call processing instructions needed for a network switch to process and complete a telephone call; and

(2) provides telecommunications carriers with the capability of entering and storing data regarding the processing and completing of a telephone call.

(B) An incumbent LEC shall provide a requesting telecommunications carrier with the information necessary to enter correctly, or format for entry, the information relevant for input into the particular incumbent LEC service management system.

(C) An incumbent LEC shall provide a requesting telecommunications carrier the same access to design, create, test, and deploy Advanced Intelligent Network-based services at the service management system, through a service creation environment, that the incumbent LEC provides to itself.

(D) A state commission shall consider whether mechanisms mediating access to Advanced Intelligent Network service management systems and service creation environments are necessary, and if so, whether they will adequately safeguard against intentional or unintentional misuse of the incumbent LEC's Advanced Intelligent Network facilities.

(E) An incumbent LEC shall provide a requesting telecommunications carrier access to service management systems in a manner that complies with section 222 of the Act;

(f) *Operations Support Systems Functions*.

(1) Operations support systems functions consist of pre-ordering, ordering, provisioning, maintenance and repair, and billing functions supported by an incumbent LEC's databases and information.

(2) An incumbent LEC that does not currently comply with this requirement shall do so as expeditiously as possible, but, in any event, no later than January 1, 1997; and

(g) *Operator Services and Directory Assistance*. An incumbent LEC shall provide access to operator service and directory assistance facilities where technically feasible.

§ 51.321 Methods of obtaining interconnection and access to unbundled elements under section 251 of the Act.

(a) Except as provided in paragraph (e) of this section, an incumbent LEC shall provide, on terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the requirements of this part, any technically feasible method of obtaining interconnection or access to unbundled network elements at a particular point upon a request by a telecommunications carrier.

(b) Technically feasible methods of obtaining interconnection or access to unbundled network elements include, but are not limited to:

(1) physical collocation and virtual collocation at the premises of an incumbent LEC; and

(2) meet point interconnection arrangements.

(c) A previously successful method of obtaining interconnection or access to unbundled network elements at a particular premises or point on an incumbent LEC's network is substantial evidence that such method is technically feasible in the case of substantially similar network premises or points.

(d) An incumbent LEC that denies a request for a particular method of obtaining interconnection or access to unbundled network elements on the incumbent LEC's network must prove to the state commission that the requested method of obtaining interconnection or access to unbundled network elements at that point is not technically feasible.

(e) An incumbent LEC shall not be required to provide for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the incumbent LEC's premises if it demonstrates to the state commission that physical collocation is not practical for technical reasons or because of space limitations. In such cases, the incumbent LEC shall be required to provide virtual collocation, except at points where the incumbent LEC proves to the state commission that virtual collocation is not technically feasible. If virtual collocation is not technically feasible, the incumbent LEC shall provide other methods of interconnection and access to unbundled network elements to the extent technically feasible.

(f) An incumbent LEC shall submit to the state commission detailed floor plans or diagrams of any premises where the incumbent LEC claims that physical collocation is not practical because of space limitations.

(g) An incumbent LEC that is classified as a Class A company under § 32.11 of this chapter and that is not a National Exchange Carrier Association interstate tariff participant as provided in part 69, subpart G, shall continue to provide expanded interconnection service pursuant to interstate tariff in accordance with §§ 64.1401, 64.1402, 69.121 of this chapter, and the Commission's other requirements.

§ 51.323 Standards for physical collocation and virtual collocation.

(a) An incumbent LEC shall provide physical collocation and virtual collocation to requesting telecommunications carriers.

(b) An incumbent LEC shall permit the collocation of any type of equipment used for interconnection or access to unbundled network elements. Whenever an incumbent LEC objects to collocation of equipment by a requesting telecommunications carrier for purposes within the scope of section 251(c)(6) of the Act, the incumbent LEC shall prove to the state commission that the equipment will not be actually used by the telecommunications carrier for the purpose of obtaining interconnection or access to unbundled network elements. Equipment used for interconnection and access to unbundled network elements includes, but is not limited to:

(1) transmission equipment including, but not limited to, optical terminating equipment and multiplexers; and

(2) equipment being collocated to terminate basic transmission facilities pursuant to §§ 64.1401 and 64.1402 of this chapter as of August 1, 1996.

(c) Nothing in this section requires an incumbent LEC to permit collocation of switching equipment or equipment used to provide enhanced services.

(d) When an incumbent LEC provides physical collocation, virtual collocation, or both,

the incumbent LEC shall:

(1) provide an interconnection point or points, physically accessible by both the incumbent LEC and the collocating telecommunications carrier, at which the fiber optic cable carrying an interconnector's circuits can enter the incumbent LEC's premises, provided that the incumbent LEC shall designate interconnection points as close as reasonably possible to its premises;

(2) provide at least two such interconnection points at each incumbent LEC premises at which there are at least two entry points for the incumbent LEC's cable facilities, and at which space is available for new facilities in at least two of those entry points;

(3) permit interconnection of copper or coaxial cable if such interconnection is first approved by the state commission; and

(4) permit physical collocation of microwave transmission facilities except where such collocation is not practical for technical reasons or because of space limitations, in which case virtual collocation of such facilities is required where technically feasible.

(e) When providing virtual collocation, an incumbent LEC shall, at a minimum, install, maintain, and repair collocated equipment identified in paragraph (b) of this section within the same time periods and with failure rates that are no greater than those that apply to the performance of similar functions for comparable equipment of the incumbent LEC itself.

(f) An incumbent LEC shall allocate space for the collocation of the equipment identified in paragraph (b) of this section in accordance with the following requirements:

(1) an incumbent LEC shall make space available within or on its premises to requesting telecommunications carriers on a first-come, first-served basis, provided, however, that the incumbent LEC shall not be required to lease or construct additional space to provide for physical collocation when existing space has been exhausted;

(2) to the extent possible, an incumbent LEC shall make contiguous space available to requesting telecommunications carriers that seek to expand their existing collocation space;

(3) when planning renovations of existing facilities or constructing or leasing new facilities, an incumbent LEC shall take into account projected demand for collocation of equipment;

(4) an incumbent LEC may retain a limited amount of floor space for its own specific future uses, provided, however, that the incumbent LEC may not reserve space for future use on terms more favorable than those that apply to other telecommunications carriers seeking to reserve collocation space for their own future use;

(5) an incumbent LEC shall relinquish any space held for future use before denying a request for virtual collocation on the grounds of space limitations, unless the incumbent LEC proves to the state commission that virtual collocation at that point is not technically feasible; and

(6) an incumbent LEC may impose reasonable restrictions on the warehousing of unused space by collocating telecommunications carriers, provided, however, that the incumbent LEC shall not set maximum space limitations applicable to such carriers unless the incumbent LEC proves to the state commission that space constraints make such restrictions necessary.

(g) An incumbent LEC shall permit collocating telecommunications carriers to collocate equipment and connect such equipment to unbundled network transmission elements obtained from the incumbent LEC, and shall not require such telecommunications carriers to bring their own transmission facilities to the incumbent LEC's premises in which they seek to collocate equipment.

(h) An incumbent LEC shall permit a collocating telecommunications carrier to interconnect its network with that of another collocating telecommunications carrier at the incumbent LEC's premises and to connect its collocated equipment to the collocated equipment of another telecommunications carrier within the same premises provided that the collocated equipment is also used for interconnection with the incumbent LEC or for access to the incumbent LEC's unbundled network elements.

(1) An incumbent LEC shall provide the connection between the equipment in the collocated spaces of two or more telecommunications carriers, unless the incumbent LEC permits one or more of the collocating parties to provide this connection for themselves; and

(2) An incumbent LEC is not required to permit collocating telecommunications carriers to place their own connecting transmission facilities within the incumbent LEC's premises outside of the actual physical collocation space.

(i) An incumbent LEC may require reasonable security arrangements to separate a collocating telecommunications carrier's space from the incumbent LEC's facilities.

(j) An incumbent LEC shall permit a collocating telecommunications carrier to subcontract the construction of physical collocation arrangements with contractors approved by the incumbent LEC, provided, however, that the incumbent LEC shall not unreasonably withhold approval of contractors. Approval by an incumbent LEC shall be based on the same criteria it uses in approving contractors for its own purposes.

Subpart E - Exemptions, Suspensions, and Modifications of Requirements of Section 251 of the Act.

§ 51.401 State authority.

A state commission shall determine whether a telephone company is entitled, pursuant to section 251(f) of the Act, to exemption from, or suspension or modification of, the requirements of section 251 of the Act. Such determinations shall be made on a case-by-case basis.

§ 51.403 Carriers eligible for suspension or modification under section 251(f)(2) of the Act.

A LEC is not eligible for a suspension or modification of the requirements of section 251(b) or section 251(c) of the Act pursuant to section 251(f)(2) of the Act if such LEC, at the holding company level, has two percent or more of the subscriber lines installed in the aggregate nationwide.

§ 51.405 Burden of proof.

(a) Upon receipt of a bona fide request for interconnection, services, or access to unbundled network elements, a rural telephone company must prove to the state commission that the rural telephone company should be entitled, pursuant to section 251(f)(1) of the Act, to continued exemption from the requirements of section 251(c) of the Act.

(b) A LEC with fewer than two percent of the nation's subscriber lines installed in the aggregate nationwide must prove to the state commission, pursuant to section 251(f)(2) of the Act, that it is entitled to a suspension or modification of the application of a requirement or requirements of section 251(b) or 251(c) of the Act.

(c) In order to justify continued exemption under section 251(f)(1) of the Act once a bona fide request has been made, an incumbent LEC must offer evidence that the application of the requirements of section 251(c) of the Act would be likely to cause undue economic burden beyond the economic burden that is typically associated with efficient competitive entry.

(d) In order to justify a suspension or modification under section 251(f)(2) of the Act, a LEC must offer evidence that the application of section 251(b) or section 251(c) of the Act would be likely to cause undue economic burden beyond the economic burden that is typically associated with efficient competitive entry.

Subpart F - Pricing of Elements.

§ 51.501 Scope.

(a) The rules in this subpart apply to the pricing of network elements, interconnection, and methods of obtaining access to unbundled elements, including physical collocation and virtual collocation.

(b) As used in this subpart, the term "element" includes network elements, interconnection, and methods of obtaining interconnection and access to unbundled elements.

§ 51.503 General pricing standard.

(a) An incumbent LEC shall offer elements to requesting telecommunications carriers at rates, terms, and conditions that are just, reasonable, and nondiscriminatory.

(b) An incumbent LEC's rates for each element it offers shall comply with the rate structure rules set forth in §§ 51.507 and 51.509 of this part, and shall be established, at the election of the state commission--

(1) pursuant to the forward-looking economic cost-based pricing methodology set forth in §§ 51.505 and 51.511 of this part; or

(2) consistent with the proxy ceilings and ranges set forth in § 51.513 of this

part.

(c) The rates that an incumbent LEC assesses for elements shall not vary on the basis of the class of customers served by the requesting carrier, or on the type of services that the requesting carrier purchasing such elements uses them to provide.

§ 51.505 Forward-looking economic cost.

(a) *In general.* The forward-looking economic cost of an element equals the sum of:

(1) the total element long-run incremental cost of the element, as described in paragraph (b); and

(2) a reasonable allocation of forward-looking common costs, as described in paragraph (c).

(b) *Total element long-run incremental cost.* The total element long-run incremental cost of an element is the forward-looking cost over the long run of the total quantity of the facilities and functions that are directly attributable to, or reasonably identifiable as incremental to, such element, calculated taking as a given the incumbent LEC's provision of other elements.

(1) *Efficient network configuration.* The total element long-run incremental cost of an element should be measured based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration, given the existing location of the incumbent LEC's wire centers.

(2) *Forward-looking cost of capital.* The forward-looking cost of capital shall be used in calculating the total element long-run incremental cost of an element.

(3) *Depreciation rates.* The depreciation rates used in calculating forward-looking economic costs of elements shall be economic depreciation rates.

(c) *Reasonable allocation of forward-looking common costs.*

(1) *Forward-looking common costs.* Forward-looking common costs are economic costs efficiently incurred in providing a group of elements or services (which may include all elements or services provided by the incumbent LEC) that cannot be attributed directly to individual elements or services.

(2) *Reasonable allocation.*

(A) The sum of a reasonable allocation of forward-looking common costs and the total element long-run incremental cost of an element shall not exceed the stand-alone costs associated with the element. In this context, stand-alone costs are the total forward-looking costs, including corporate costs, that would be incurred to produce a given element if that element were provided by an efficient firm that produced nothing but the given element.

(B) The sum of the allocation of forward-looking common costs for all elements and services shall equal the total forward-looking common costs, exclusive of retail costs, attributable to operating the incumbent LEC's total network, so as to provide all the elements and services offered.

(d) *Factors that may not be considered.* The following factors shall not be considered in a calculation of the forward-looking economic cost of an element:

(1) *Embedded costs*. Embedded costs are the costs that the incumbent LEC incurred in the past and that are recorded in the incumbent LEC's books of accounts.

(2) *Retail costs*. Retail costs include the costs of marketing, billing, collection, and other costs associated with offering retail telecommunications services to subscribers who are not telecommunications carriers, described in § 51.609 of this part.

(3) *Opportunity costs*. Opportunity costs include the revenues that the incumbent LEC would have received for the sale of telecommunications services, in the absence of competition from telecommunications carrier that purchase elements.

(4) *Revenues to subsidize other services*. Revenues to subsidize other services include revenues associated with elements or telecommunications service offerings other than the element for which a rate is being established.

(e) *Cost study requirements*. An incumbent LEC must prove to the state commission that the rates for each element it offers do not exceed the forward-looking economic cost per unit of providing the element, using a cost study that complies with the methodology set forth in this section and § 51.511 of this part.

(1) A state commission may set a rate outside the proxy ranges or above the proxy ceilings described in § 51.513 of this part only if that commission has given full and fair effect to the economic cost based pricing methodology described in this section and § 51.511 of this part in a state proceeding that meets the requirements of paragraph (e)(2) of this section.

(2) Any state proceeding conducted pursuant to this section shall provide notice and an opportunity for comment to affected parties and shall result in the creation of a written factual record that is sufficient for purposes of review. The record of any state proceeding in which a state commission considers a cost study for purposes of establishing rates under this section shall include any such cost study.

§ 51.507 General rate structure standard.

(a) Element rates shall be structured consistently with the manner in which the costs of providing the elements are incurred.

(b) The costs of dedicated facilities shall be recovered through flat-rated charges.

(c) The costs of shared facilities shall be recovered in a manner that efficiently apportions costs among users. Costs of shared facilities may be apportioned either through usage-sensitive charges or capacity-based flat-rated charges, if the state commission finds that such rates reasonably reflect the costs imposed by the various users.

(d) Recurring costs shall be recovered through recurring charges, unless an incumbent LEC proves to a state commission that such recurring costs are de minimis. Recurring costs shall be considered de minimis when the costs of administering the recurring charge would be excessive in relation to the amount of the recurring costs.

(e) State commissions may, where reasonable, require incumbent LECs to recover nonrecurring costs through recurring charges over a reasonable period of time. Nonrecurring

charges shall be allocated efficiently among requesting telecommunications carriers, and shall not permit an incumbent LEC to recover more than the total forward-looking economic cost of providing the applicable element.

(f) State commissions shall establish different rates for elements in at least three defined geographic areas within the state to reflect geographic cost differences.

(1) To establish geographically-deaveraged rates, state commissions may use existing density-related zone pricing plans described in § 69.123 of this chapter, or other such cost-related zone plans established pursuant to state law.

(2) In states not using such existing plans, state commissions must create a minimum of three cost-related rate zones.

§ 51.509 Rate structure standards for specific elements.

In addition to the general rules set forth in § 51.507 of this part, rates for specific elements shall comply with the following rate structure rules.

(a) *Local loops*. Loop costs shall be recovered through flat-rated charges.

(b) *Local switching*. Local switching costs shall be recovered through a combination of a flat-rated charge for line ports and one or more flat-rated or per-minute usage charges for the switching matrix and for trunk ports.

(c) *Dedicated transmission links*. Dedicated transmission link costs shall be recovered through flat-rated charges.

(d) *Shared transmission facilities between tandem switches and end offices*. The costs of shared transmission facilities between tandem switches and end offices may be recovered through usage-sensitive charges, or in another manner consistent with the manner that the incumbent LEC incurs those costs.

(e) *Tandem switching*. Tandem switching costs may be recovered through usage-sensitive charges, or in another manner consistent with the manner that the incumbent LEC incurs those costs.

(f) *Signaling and call-related database services*. Signaling and call-related database service costs shall be usage-sensitive, based on either the number of queries or the number of messages, with the exception of the dedicated circuits known as signaling links, the cost of which shall be recovered through flat-rated charges.

(g) *Collocation*. Collocation costs shall be recovered consistent with the rate structure policies established in the *Expanded Interconnection* proceeding, CC Docket No. 91-141.

§ 51.511 Forward-looking economic cost per unit.

(a) The forward-looking economic cost per unit of an element equals the forward-looking economic cost of the element, as defined in § 51.505 of this part, divided by a reasonable projection of the sum of the total number of units of the element that the incumbent LEC is likely to provide to requesting telecommunications carriers and the total number of units of the element that the incumbent LEC is likely to use in offering its own services, during a reasonable measuring period.

(b) (1) With respect to elements that an incumbent LEC offers on a flat-rate basis, the number of units is defined as the discrete number of elements (*e.g.*, local loops or local switch ports) that the incumbent LEC uses or provides.

(2) With respect to elements that an incumbent LEC offers on a usage-sensitive basis, the number of units is defined as the unit of measurement of the usage (*e.g.*, minutes of use or call-related database queries) of the element.

§ 51.513 Proxies for forward-looking economic cost.

(a) A state commission may determine that the cost information available to it with respect to one or more elements does not support the adoption of a rate or rates that are consistent with the requirements set forth in §§ 51.505 and 51.511 of this part. In that event, the state commission may establish a rate for an element that is consistent with the proxies specified in this section, provided that:

(1) any rate established through use of such proxies shall be superseded once the state commission has completed review of a cost study that complies with the forward-looking economic cost based pricing methodology described in §§ 51.505 and 51.511 of this part, and has concluded that such study is a reasonable basis for establishing element rates; and

(2) the state commission sets forth in writing a reasonable basis for its selection of a particular rate for the element.

(b) The constraints on proxy-based rates described in this section apply on a geographically averaged basis. For purposes of determining whether geographically deaveraged rates for elements comply with the provisions of this section, a geographically averaged proxy-based rate shall be computed based on the weighted average of the actual, geographically deaveraged rates that apply in separate geographic areas in a state.

(c) *Proxies for specific elements*.

(1) *Local loops*. For each state listed below, the proxy-based monthly rate for unbundled local loops, on a statewide weighted average basis, shall be no greater than the figures listed in the table below. (The Commission has not established a default proxy ceiling for loop rates in Alaska).

TABLE A

State	Proxy Ceiling	State	Proxy Ceiling
Alabama	$17.25	Nebraska	$18.05
Arizona	$12.85	Nevada	$18.95
Arkansas	$21.18	New Hampshire	$16.00
California	$11.10	New Jersey	$12.47
Colorado	$14.97	New Mexico	$18.66
Connecticut	$13.23	New York	$11.75
Delaware	$13.24	North Carolina	$16.71
District of Columbia	$10.81	North Dakota	$25.36
Florida	$13.68	Ohio	$15.73
Georgia	$16.09	Oklahoma	$17.63
Hawaii	$15.27	Oregon	$15.44
Idaho	$20.16	Pennsylvania	$12.30
Illinois	$13.12	Puerto Rico	$12.47
Indiana	$13.29	Rhode Island	$11.48
Iowa	$15.94	South Carolina	$17.07
Kansas	$19.85	South Dakota	$25.33
Kentucky	$16.70	Tennessee	$17.41
Louisiana	$16.98	Texas	$15.49
Maine	$18.69	Utah	$15.12
Maryland	$13.36	Vermont	$20.13
Massachusetts	$9.83	Virginia	$14.13
Michigan	$15.27	Washington	$13.37
Minnesota	$14.81	West Virginia	$19.25
Mississippi	$21.97	Wisconsin	$15.94
Missouri	$18.32	Wyoming	$25.11
Montana	$25.18		

(2) *Local switching*. The blended proxy-based rate for unbundled local switching shall be no greater than 0.4 cents ($0.004) per minute, and no less than 0.2 cents ($0.002) per minute, except that, where a state commission has, before August 8, 1996, established a rate less than or equal to 0.5 cents ($0.005) per minute, that rate may be retained pending completion of a forward-looking economic cost study. The blended rate for unbundled local switching shall be calculated as the sum of the following:

(A) the applicable flat-rated charges for subelements associated with unbundled local switching, such as line ports, divided by the projected average minutes of use per flat-rated subelement; and

(B) the applicable usage-sensitive charges for subelements associated with unbundled local switching, such as switching and trunk ports. A weighted average of such charges shall be used in appropriate circumstances, such as when peak and off-peak charges are used.

(3) *Dedicated transmission links*. The proxy-based rates for dedicated transmission links shall be no greater than the incumbent LEC's tariffed interstate charges for comparable entrance facilities or direct-trunked transport offerings, as described in §§ 69.110 and 69.112 of this chapter.

(4) *Shared transmission facilities between tandem switches and end offices*. The proxy-based rates for shared transmission facilities between tandem switches and end offices shall be no greater than the weighted per-minute equivalent of DS1 and DS3 interoffice dedicated transmission link rates that reflects the relative number of DS1 and DS3 circuits used in the tandem to end office links (or a surrogate based on the proportion of copper and fiber facilities in the interoffice network), calculated using a loading factor of 9,000 minutes per month per voice-grade circuit, as described in § 69.112 of this chapter.

(5) *Tandem switching*. The proxy-based rate for tandem switching shall be no greater than 0.15 cents ($0.0015) per minute of use.

(6) *Collocation*. To the extent that the incumbent LEC offers a comparable form of collocation in its interstate expanded interconnection tariffs, as described in §§ 64.1401 and 69.121 of this chapter, the proxy-based rates for collocation shall be no greater than the effective rates for equivalent services in the interstate expanded interconnection tariff. To the extent that the incumbent LEC does not offer a comparable form of collocation in its interstate expanded interconnection tariffs, a state commission may, in its discretion, establish a proxy-based rate, provided that the state commission sets forth in writing a reasonable basis for concluding that its rate would approximate the result of a forward-looking economic cost study, as described in § 51.505 of this part.

(7) *Signaling, call-related database, and other elements*. To the extent that the incumbent LEC has established rates for offerings comparable to other elements in its interstate access tariffs, and has provided cost support for those rates pursuant to § 61.49(h) of this chapter, the proxy-based rates for those elements shall be no greater than the effective rates for equivalent services in the interstate access tariffs. In other cases, the proxy-based rate shall be no greater than a rate based on direct costs plus a reasonable allocation of overhead loadings, pursuant to § 61.49(h) of this chapter.

§ 51.515 Application of access charges.

(a) Neither the interstate access charges described in part 69 nor comparable intrastate access charges shall be assessed by an incumbent LEC on purchasers of elements that offer telephone exchange or exchange access services.

(b) Notwithstanding §§ 51.505, 51.511, and 51.513(d)(2) of this part and paragraph (a) of this section, an incumbent LEC may assess upon telecommunications carriers that purchase unbundled local switching elements, as described in § 51.319(c)(1) of this part, for interstate minutes of use traversing such unbundled local switching elements, the carrier common line charge described in § 69.105 of this chapter, and a charge equal to 75% of the interconnection

charge described in § 69.124 of this chapter, only until the earliest of the following, and not thereafter:

(1) June 30, 1997;

(2) the later of the effective date of a final Commission decision in CC Docket No. 96-45, *Federal-State Joint Board on Universal Service*, or the effective date of a final Commission decision in a proceeding to consider reform of the interstate access charges described in part 69; or

(3) with respect to a Bell operating company only, the date on which that company is authorized to offer in-region interLATA service in a state pursuant to section 271 of the Act. The end date for Bell operating companies that are authorized to offer interLATA service shall apply only to the recovery of access charges in those states in which the Bell operating company is authorized to offer such service.

(c) Notwithstanding §§ 51.505, 51.511, and 51.513(d)(2) of this part and paragraph (a) of this section, an incumbent LEC may assess upon telecommunications carriers that purchase unbundled local switching elements, as described in § 51.319(c)(1) of this part, for intrastate toll minutes of use traversing such unbundled local switching elements, intrastate access charges comparable to those listed in paragraph (b) and any explicit intrastate universal service mechanism based on access charges, only until the earliest of the following, and not thereafter:

(1) June 30, 1997;

(2) the effective date of a state commission decision that an incumbent LEC may not assess such charges; or

(3) with respect to a Bell operating company only, the date on which that company is authorized to offer in-region interLATA service in the state pursuant to section 271 of the Act. The end date for Bell operating companies that are authorized to offer interLATA service shall apply only to the recovery of access charges in those states in which the Bell operating company is authorized to offer such service.

Subpart G - Resale.

§ 51.601 Scope of resale rules.

The provisions of this subpart govern the terms and conditions under which LECs offer telecommunications services to requesting telecommunications carriers for resale.

§ 51.603 Resale obligation of all local exchange carriers.

(a) A LEC shall make its telecommunications services available for resale to requesting telecommunications carriers on terms and conditions that are reasonable and non-discriminatory.

(b) A LEC must provide services to requesting telecommunications carriers for resale that are equal in quality, subject to the same conditions, and provided within the same provisioning time intervals that the LEC provides these services to others, including end users.

§ 51.605 Additional obligations of incumbent local exchange carriers.

(a) An incumbent LEC shall offer to any requesting telecommunications carrier any telecommunications service that the incumbent LEC offers on a retail basis to subscribers that are not telecommunications carriers for resale at wholesale rates that are at the election of the state commission--

(1) consistent with the avoided cost methodology described in §§ 51.607 and 51.609 of this part; or

(2) interim wholesale rates, pursuant to § 51.611 of this part,

(b) Except as provided in § 51.613 of this part, an incumbent LEC shall not impose restrictions on the resale by a requesting carrier of telecommunications services offered by the incumbent LEC.

§ 51.607 Wholesale pricing standard.

(a) The wholesale rate that an incumbent LEC may charge for a telecommunications service provided for resale to other telecommunications carriers shall equal the incumbent LEC's existing retail rate for the telecommunications service, less avoided retail costs, as described in § 51.609 of this part.

(b) For purposes of this subpart, exchange access services, as defined in section 3 of the Act, shall not be considered to be telecommunications services that incumbent LECs must make available for resale at wholesale rates to requesting telecommunications carriers.

§ 51.609 Determination of avoided retail costs.

(a) Except as provided in § 51.611 of this part, the amount of avoided retail costs shall be determined on the basis of a cost study that complies with the requirements of this section.

(b) Avoided retail costs shall be those costs that reasonably can be avoided when an incumbent LEC provides a telecommunications service for resale at wholesale rates to a requesting carrier.

(c) For incumbent LECs that are designated as Class A companies under § 32.11 of this chapter, except as provided in paragraph (d), avoided retail costs shall:

(1) include, as direct costs, the costs recorded in USOA accounts 6611 (product management), 6612 (sales), 6613 (product advertising), 6621 (call completion services), 6622 (number services), and 6623 (customer services) (§§ 32.6611, 32.6612, 32.6613, 32.6621, 32.6622, and 32.6623);

(2) include, as indirect costs, a portion of the costs recorded in USOA accounts 6121-6124 (general support expenses), 6711, 6712, 6721-6728 (corporate operations expenses), and 5301 (telecommunications uncollectibles) (§§ 32.6121-32.6124, 32.6711, 32.6712, 32.6721-32.6728, and 32.5301); and

(3) not include plant-specific expenses and plant non-specific expenses, other than

general support expenses (§§ 32.6110-32.6116, 32.6210-32.6565).

(d) Costs included in accounts 6611-6613 and 6621-6623 described in paragraph (c) (§§ 32.6611-32.6613 and 32.6621-32.6623) may be included in wholesale rates only to the extent that the incumbent LEC proves to a state commission that specific costs in these accounts will be incurred and are not avoidable with respect to services sold at wholesale, or that specific costs in these accounts are not included in the retail prices of resold services. Costs included in accounts 6110-6116 and 6210-6565 described in paragraph (c) (§§ 32.6110-32.6116, 32.6210-32.6565) may be treated as avoided retail costs, and excluded from wholesale rates, only to the extent that a party proves to a state commission that specific costs in these accounts can reasonably be avoided when an incumbent LEC provides a telecommunications service for resale to a requesting carrier.

(e) For incumbent LECs that are designated as Class B companies under § 32.11 of this chapter and that record information in summary accounts instead of specific USOA accounts, the entire relevant summary accounts may be used in lieu of the specific USOA accounts listed in paragraphs (c) and (d).

§ 51.611 Interim wholesale rates.

(a) If a state commission cannot, based on the information available to it, establish a wholesale rate using the methodology prescribed in § 51.609 of this part, then the state commission may elect to establish an interim wholesale rate as described in paragraph (b) of this section.

(b) The state commission may establish interim wholesale rates that are at least 17 percent, and no more than 25 percent, below the incumbent LEC's existing retail rates, and shall articulate the basis for selecting a particular discount rate. The same discount percentage rate shall be used to establish interim wholesale rates for each telecommunications service.

(c) A state commission that establishes interim wholesale rates shall, within a reasonable period of time thereafter, establish wholesale rates on the basis of an avoided retail cost study that complies with § 51.609 of this part.

§ 51.613 Restrictions on resale.

(a) Notwithstanding § 51.605(b) of this part, the following types of restrictions on resale may be imposed:

(1) *Cross-class selling*. A state commission may permit an incumbent LEC to prohibit a requesting telecommunications carrier that purchases at wholesale rates for resale, telecommunications services that the incumbent LEC makes available only to residential customers or to a limited class of residential customers, from offering such services to classes of customers that are not eligible to subscribe to such services from the incumbent LEC.

(2) *Short term promotions*. An incumbent LEC shall apply the wholesale discount to the ordinary rate for a retail service rather than a special promotional rate only if:

(A) such promotions involve rates that will be in effect for no more than 90 days; and

(B) the incumbent LEC does not use such promotional offerings to evade the wholesale rate obligation, for example by making available a sequential series of 90-day promotional rates.

(b) With respect to any restrictions on resale not permitted under paragraph (a), an incumbent LEC may impose a restriction only if it proves to the state commission that the restriction is reasonable and nondiscriminatory.

(c) *Branding*. Where operator, call completion, or directory assistance service is part of the service or service package an incumbent LEC offers for resale, failure by an incumbent LEC to comply with reseller unbranding or rebranding requests shall constitute a restriction on resale.

(1) An incumbent LEC may impose such a restriction only if it proves to the state commission that the restriction is reasonable and nondiscriminatory, such as by proving to a state commission that the incumbent LEC lacks the capability to comply with unbranding or rebranding requests.

(2) For purposes of this subpart, unbranding or rebranding shall mean that operator, call completion, or directory assistance services are offered in such a manner that an incumbent LEC's brand name or other identifying information is not identified to subscribers, or that such services are offered in such a manner that identifies to subscribers the requesting carrier's brand name or other identifying information.

§ 51.615 Withdrawal of services.

When an incumbent LEC makes a telecommunications service available only to a limited group of customers that have purchased such a service in the past, the incumbent LEC must also make such a service available at wholesale rates to requesting carriers to offer on a resale basis to the same limited group of customers that have purchased such a service in the past.

§ 51.617 Assessment of end user common line charge on resellers.

(a) Notwithstanding the provision in § 69.104(a) of this chapter that the end user common line charge be assessed upon end users, an incumbent LEC shall assess this charge, and the charge for changing the designated primary interexchange carrier, upon requesting carriers that purchase telephone exchange service for resale. The specific end user common line charge to be assessed will depend upon the identity of the end user served by the requesting carrier.

(b) When an incumbent LEC provides telephone exchange service to a requesting carrier at wholesale rates for resale, the incumbent LEC shall continue to assess the interstate access

charges provided in part 69, other than the end user common line charge, upon interexchange carriers that use the incumbent LEC's facilities to provide interstate or international telecommunications services to the interexchange carriers' subscribers.

Subpart H - Reciprocal Compensation for Transport and Termination of Local Telecommunications Traffic.

§ 51.701 Scope of transport and termination pricing rules.

(a) The provisions of this subpart apply to reciprocal compensation for transport and termination of local telecommunications traffic between LECs and other telecommunications carriers.

(b) *Local telecommunications traffic*. For purposes of this subpart, local telecommunications traffic means:

(1) telecommunications traffic between a LEC and a telecommunications carrier other than a CMRS provider that originates and terminates within a local service area established by the state commission; or

(2) telecommunications traffic between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area, as defined in § 24.202(a) of this chapter.

(c) *Transport*. For purposes of this subpart, transport is the transmission and any necessary tandem switching of local telecommunications traffic subject to section 251(b)(5) of the Act from the interconnection point between the two carriers to the terminating carrier's end office switch that directly serves the called party, or equivalent facility provided by a carrier other than an incumbent LEC.

(d) *Termination*. For purposes of this subpart, termination is the switching of local telecommunications traffic at the terminating carrier's end office switch, or equivalent facility, and delivery of such traffic to the called party's premises.

(e) *Reciprocal compensation*. For purposes of this subpart, a reciprocal compensation arrangement between two carriers is one in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of local telecommunications traffic that originates on the network facilities of the other carrier.

§ 51.703 Reciprocal compensation obligation of LECs.

(a) Each LEC shall establish reciprocal compensation arrangements for transport and termination of local telecommunications traffic with any requesting telecommunications carrier.

(b) A LEC may not assess charges on any other telecommunications carrier for local telecommunications traffic that originates on the LEC's network.

§ 51.705 Incumbent LECs' rates for transport and termination.

(a) An incumbent LEC's rates for transport and termination of local telecommunications traffic shall be established, at the election of the state commission, on the basis of:

(1) the forward-looking economic costs of such offerings, using a cost study pursuant to §§ 51.505 and 51.511 of this part;

(2) default proxies, as provided in § 51.707 of this part; or

(3) a bill-and-keep arrangement, as provided in § 51.713 of this part.

(b) In cases where both carriers in a reciprocal compensation arrangement are incumbent LECs, state commissions shall establish the rates of the smaller carrier on the basis of the larger carrier's forward-looking costs, pursuant to § 51.711 of this part.

§ 51.707 Default proxies for incumbent LECs' transport and termination rates.

(a) A state commission may determine that the cost information available to it with respect to transport and termination of local telecommunications traffic does not support the adoption of a rate or rates for an incumbent LEC that are consistent with the requirements of §§ 51.505 and 51.511 of this part. In that event, the state commission may establish rates for transport and termination of local telecommunications traffic, or for specific components included therein, that are consistent with the proxies specified in this section, provided that:

(1) any rate established through use of such proxies is superseded once that state commission establishes rates for transport and termination pursuant to §§ 51.705(a)(1) or 51.705(a)(3) of this part; and

(2) the state commission sets forth in writing a reasonable basis for its selection of a particular proxy for transport and termination of local telecommunications traffic, or for specific components included within transport and termination.

(b) If a state commission establishes rates for transport and termination of local telecommunications traffic on the basis of default proxies, such rates must meet the following requirements:

(1) *Termination*. The incumbent LEC's rates for the termination of local telecommunications traffic shall be no greater than 0.4 cents ($0.004) per minute, and no less than 0.2 cents ($0.002) per minute, except that, if a state commission has, before August 8, 1996, established a rate less than or equal to 0.5 cents ($0.005) per minute for such calls, that rate may be retained pending completion of a forward-looking economic cost study.

(2) *Transport*. The incumbent LEC's rates for the transport of local telecommunications traffic, under this section, shall comply with the proxies described in § 51.513(d)(3), (4), and (5) of this part that apply to the analogous unbundled network elements used in transporting a call to the end office that serves the called party.

§ 51.709 Rate structure for transport and termination.

(a) In state proceedings, a state commission shall establish rates for the transport and termination of local telecommunications traffic that are structured consistently with the manner

that carriers incur those costs, and consistently with the principles in §§ 51.507 and 51.509 of this part.

(b) The rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network. Such proportions may be measured during peak periods.

§ 51.711 Symmetrical reciprocal compensation.

(a) Rates for transport and termination of local telecommunications traffic shall be symmetrical, except as provided in paragraphs (b) and (c).

(1) For purposes of this subpart, symmetrical rates are rates that a carrier other than an incumbent LEC assesses upon an incumbent LEC for transport and termination of local telecommunications traffic equal to those that the incumbent LEC assesses upon the other carrier for the same services.

(2) In cases where both parties are incumbent LECs, or neither party is an incumbent LEC, a state commission shall establish the symmetrical rates for transport and termination based on the larger carrier's forward-looking costs.

(3) Where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate.

(b) A state commission may establish asymmetrical rates for transport and termination of local telecommunications traffic only if the carrier other than the incumbent LEC (or the smaller of two incumbent LECs) proves to the state commission on the basis of a cost study using the forward-looking economic cost based pricing methodology described in §§ 51.505 and 51.511 of this part, that the forward-looking costs for a network efficiently configured and operated by the carrier other than the incumbent LEC (or the smaller of two incumbent LECs), exceed the costs incurred by the incumbent LEC (or the larger incumbent LEC), and, consequently, that such that a higher rate is justified.

(c) Pending further proceedings before the Commission, a state commission shall establish the rates that licensees in the Paging and Radiotelephone Service (defined in part 22, subpart E of this chapter), Narrowband Personal Communications Services (defined in part 24, subpart D of this chapter), and Paging Operations in the Private Land Mobile Radio Services (defined in part 90, subpart P of this chapter) may assess upon other carriers for the transport and termination of local telecommunications traffic based on the forward-looking costs that such licensees incur in providing such services, pursuant to §§ 51.505 and 51.511 of this part. Such licensees' rates shall not be set based on the default proxies described in § 51.707 of this part.

§ 51.713 Bill-and-keep arrangements for reciprocal compensation.

(a) For purposes of this subpart, bill-and-keep arrangements are those in which neither

of the two interconnecting carriers charges the other for the termination of local telecommunications traffic that originates on the other carrier's network.

(b) A state commission may impose bill-and-keep arrangements if the state commission determines that the amount of local telecommunications traffic from one network to the other is roughly balanced with the amount of local telecommunications traffic flowing in the opposite direction, and is expected to remain so, and no showing has been made pursuant to § 51.711(b) of this part.

(c) Nothing in this section precludes a state commission from presuming that the amount of local telecommunications traffic from one network to the other is roughly balanced with the amount of local telecommunications traffic flowing in the opposite direction and is expected to remain so, unless a party rebuts such a presumption.

§ 51.715 Interim transport and termination pricing.

(a) Upon request from a telecommunications carrier without an existing interconnection arrangement with an incumbent LEC, the incumbent LEC shall provide transport and termination of local telecommunications traffic immediately under an interim arrangement, pending resolution of negotiation or arbitration regarding transport and termination rates and approval of such rates by a state commission under sections 251 and 252 of the Act.

(1) This requirement shall not apply when the requesting carrier has an existing interconnection arrangement that provides for the transport and termination of local telecommunications traffic by the incumbent LEC.

(2) A telecommunications carrier may take advantage of such an interim arrangement only after it has requested negotiation with the incumbent LEC pursuant to § 51.301 of this part.

(b) Upon receipt of a request as described in paragraph (a), an incumbent LEC must, without unreasonable delay, establish an interim arrangement for transport and termination of local telecommunications traffic at symmetrical rates.

(1) In a state in which the state commission has established transport and termination rates based on forward-looking economic cost studies, an incumbent LEC shall use these state-determined rates as interim transport and termination rates.

(2) In a state in which the state commission has established transport and termination rates consistent with the default price ranges and ceilings described in § 51.707 of this part, an incumbent LEC shall use these state-determined rates as interim rates.

(3) In a state in which the state commission has neither established transport and termination rates based on forward-looking economic cost studies nor established transport and termination rates consistent with the default price ranges described in § 51.707 of this part, an incumbent LEC shall set interim transport and termination rates at the default ceilings for end-office switching (0.4 cents per minute of use), tandem switching (0.15 cents per minute of use), and transport (as described in § 51.707(b)(2) of this part).

(c) An interim arrangement shall cease to be in effect when one of the following occurs

with respect to rates for transport and termination of local telecommunications traffic subject to the interim arrangement:

(1) a voluntary agreement has been negotiated and approved by a state commission;

(2) an agreement has been arbitrated and approved by a state commission; or

(3) the period for requesting arbitration has passed with no such request.

(d) If the rates for transport and termination of local telecommunications traffic in an interim arrangement differ from the rates established by a state commission pursuant to § 51.705 of this part, the state commission shall require carriers to make adjustments to past compensation. Such adjustments to past compensation shall allow each carrier to receive the level of compensation it would have received had the rates in the interim arrangement equalled the rates later established by the state commission pursuant to § 51.705 of this part.

§ 51.717 Renegotiation of existing non-reciprocal arrangements.

(a) Any CMRS provider that operates under an arrangement with an incumbent LEC that was established before August 8, 1996 and that provides for non-reciprocal compensation for transport and termination of local telecommunications traffic is entitled to renegotiate these arrangements with no termination liability or other contract penalties.

(b) From the date that a CMRS provider makes a request under paragraph (a) until a new agreement has been either arbitrated or negotiated and has been approved by a state commission, the CMRS provider shall be entitled to assess upon the incumbent LEC the same rates for the transport and termination of local telecommunications traffic that the incumbent LEC assesses upon the CMRS provider pursuant to the pre-existing arrangement.

Subpart I - Procedures for Implementation of Section 252 of the Act.

§ 51.801 Commission action upon a state commission's failure to act to carry out its responsibility under section 252 of the Act.

(a) If a state commission fails to act to carry out its responsibility under section 252 of the Act in any proceeding or other matter under section 252 of the Act, the Commission shall issue an order preempting the state commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the state commission under section 252 of the Act with respect to the proceeding or matter and shall act for the state commission.

(b) For purposes of this part, a state commission fails to act if the state commission fails to respond, within a reasonable time, to a request for mediation, as provided for in section 252(a)(2) of the Act, or for a request for arbitration, as provided for in section 252(b) of the Act, or fails to complete an arbitration within the time limits established in section 252(b)(4)(C) of the Act.

(c) A state shall not be deemed to have failed to act for purposes of section 252(e)(5) of the Act if an agreement is deemed approved under section 252(e)(4) of the Act.

§ 51.803 Procedures for Commission notification of a state commission's failure to act.

(a) Any party seeking preemption of a state commission's jurisdiction, based on the state commission's failure to act, shall notify the Commission in accordance with following procedures:

(1) such party shall file with the Secretary of the Commission a petition, supported by an affidavit, that states with specificity the basis for the petition and any information that supports the claim that the state has failed to act, including, but not limited to, the applicable provisions of the Act and the factual circumstances supporting a finding that the state commission has failed to act;

(2) such party shall ensure that the state commission and the other parties to the proceeding or matter for which preemption is sought are served with the petition required in paragraph (a)(1) of this section on the same date that the petitioning party serves the petition on the Commission; and

(3) within fifteen days from the date of service of the petition required in paragraph (a)(1) of this section, the applicable state commission and parties to the proceeding may file with the Commission a response to the petition.

(b) The party seeking preemption must prove that the state has failed to act to carry out its responsibilities under section 252 of the Act.

(c) The Commission, pursuant to section 252(e)(5) of the Act, may take notice upon its own motion that a state commission has failed to act. In such a case, the Commission shall issue a public notice that the Commission has taken notice of a state commission's failure to act. The applicable state commission and the parties to a proceeding or matter in which the Commission has taken notice of the state commission's failure to act may file, within fifteen days of the issuance of the public notice, comments on whether the Commission is required to assume the responsibility of the state commission under section 252 of the Act with respect to the proceeding or matter.

(d) The Commission shall issue an order determining whether it is required to preempt the state commission's jurisdiction of a proceeding or matter within 90 days after being notified under paragraph (a) of this section or taking notice under paragraph (c) of this section of a state commission's failure to carry out its responsibilities under section 252 of the Act.

§ 51.805 The Commission's authority over proceedings and matters.

(a) If the Commission assumes responsibility for a proceeding or matter pursuant to section 252(e)(5) of the Act, the Commission shall retain jurisdiction over such proceeding or matter. At a minimum, the Commission shall approve or reject any interconnection agreement adopted by negotiation, mediation or arbitration for which the Commission, pursuant to section

252(e)(5) of the Act, has assumed the state's commission's responsibilities.

(b) Agreements reached pursuant to mediation or arbitration by the Commission pursuant to section 252(e)(5) of the Act are not required to be submitted to the state commission for approval or rejection.

§ 51.807 Arbitration and mediation of agreements by the Commission pursuant to section 252(e)(5) of the Act.

(a) The rules established in this section shall apply only to instances in which the Commission assumes jurisdiction under section 252(e)(5) of the Act.

(b) When the Commission assumes responsibility for a proceeding or matter pursuant to section 252(e)(5) of the Act, it shall not be bound by state laws and standards that would have applied to the state commission in such proceeding or matter.

(c) In resolving, by arbitration under section 252(b) of the Act, any open issues and in imposing conditions upon the parties to the agreement, the Commission shall:

(1) ensure that such resolution and conditions meet the requirements of section 251 of the Act, including the rules prescribed by the Commission pursuant to that section;

(2) establish any rates for interconnection, services, or network elements according to section 252(d) of the Act, including the rules prescribed by the Commission pursuant to that section; and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) An arbitrator, acting pursuant to the Commission's authority under section 252(e)(5) of the Act, shall use final offer arbitration, except as otherwise provided in this section:

(1) at the discretion of the arbitrator, final offer arbitration may take the form of either entire package final offer arbitration or issue-by-issue final offer arbitration.

(2) negotiations among the parties may continue, with or without the assistance of the arbitrator, after final arbitration offers are submitted. Parties may submit subsequent final offers following such negotiations.

(3) to provide an opportunity for final post-offer negotiations, the arbitrator will not issue a decision for at least fifteen days after submission to the arbitrator of the final offers by the parties.

(e) Final offers submitted by the parties to the arbitrator shall be consistent with section 251 of the Act, including the rules prescribed by the Commission pursuant to that section.

(f) Each final offer shall:

(1) meet the requirements of section 251, including the rules prescribed by the Commission pursuant to that section;

(2) establish rates for interconnection, services, or access to unbundled network elements according to section 252(d) of the Act, including the rules prescribed by the

Commission pursuant to that section, and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement. If a final offer submitted by one or more parties fails to comply with the requirements of this section, the arbitrator has discretion to take steps designed to result in an arbitrated agreement that satisfies the requirements of section 252(c) of the Act, including requiring parties to submit new final offers within a time frame specified by the arbitrator, or adopting a result not submitted by any party that is consistent with the requirements of section 252(c) of the Act, and the rules prescribed by the Commission pursuant to that section.

(g) Participation in the arbitration proceeding will be limited to the requesting telecommunications carrier and the incumbent LEC, except that the Commission will consider requests by third parties to file written pleadings.

(h) Absent mutual consent of the parties to change any terms and conditions adopted by the arbitrator, the decision of the arbitrator shall be binding on the parties.

§ 51.809 Availability of provisions of agreements to other telecommunications carriers under section 252(i) of the Act.

(a) An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement contained in any agreement to which it is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement. An incumbent LEC may not limit the availability of any individual interconnection, service, or network element only to those requesting carriers serving a comparable class of subscribers or providing the same service (*i.e.*, local, access, or interexchange) as the original party to the agreement.

(b) The obligations of paragraph (a) of this section shall not apply where the incumbent LEC proves to the state commission that:

(1) the costs of providing a particular interconnection, service, or element to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement, or

(2) the provision of a particular interconnection, service, or element to the requesting carrier is not technically feasible.

(c) Individual interconnection, service, or network element arrangements shall remain available for use by telecommunications carriers pursuant to this section for a reasonable period of time after the approved agreement is available for public inspection under section 252(f) of the Act.

14. Part 90 of Title 47 of the Code of Federal Regulations (C.F.R.) is amended as follows:

PART 90 - PRIVATE LAND MOBILE RADIO SERVICES

15. The authority citation for Part 90 is revised to read as follows:

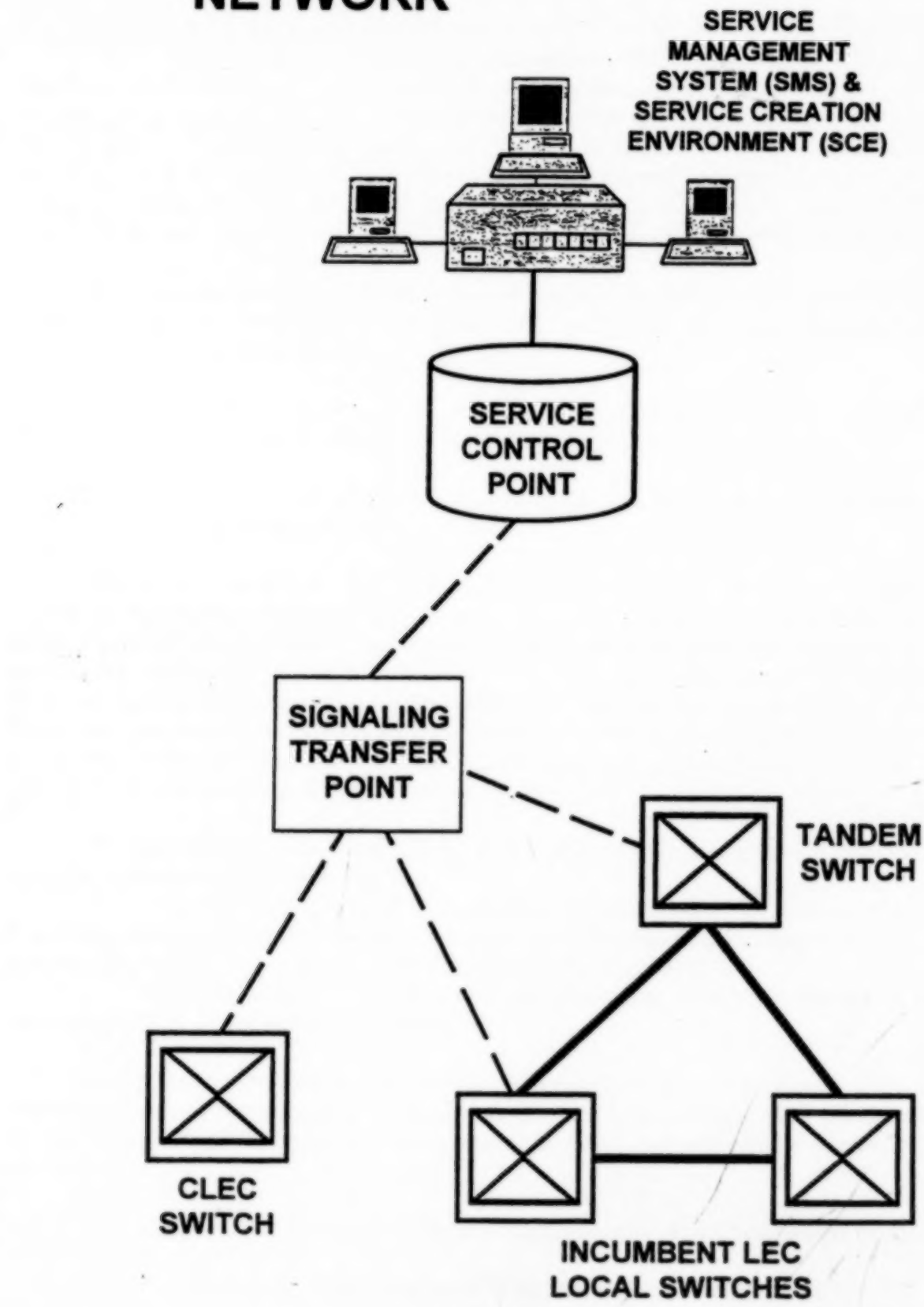
AUTHORITY: Secs. 4, 251-2, 303, 309, and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 251-2, 303, 309 and 332, unless otherwise noted.

16. Section 90.5 is amended by adding paragraph (k) and renumbering the remaining paragraphs to read as follows:

*****

(k) Part 51 contains rules relating to interconnection.
(l) ***
(m) ***

ADVANCED INTELLIGENT NETWORK



1239

16237

Appendix D
State Proxy Ceilings for the Local Loop

State	Proxy Ceiling	State	Proxy Ceiling
Alabama	$17.25	Montana	$25.18
Arizona	$12.85	Nebraska	$18.05
Arkansas	$21.18	Nevada	$18.95
California	$11.10	New Hampshire	$16.00
Colorado	$14.97	New Jersey	$12.47
Connecticut	$13.23	New Mexico	$18.66
Delaware	$13.24	New York	$11.75
District of Columbia	$10.81	North Carolina	$16.71
Florida	$13.68	North Dakota	$25.36
Georgia	$16.09	Ohio	$15.73
Hawaii	$15.27	Oklahoma	$17.63
Idaho	$20.16	Oregon	$15.44
Illinois	$13.12	Pennsylvania	$12.30
Indiana	$13.29	Puerto Rico	$12.47
Iowa	$15.94	Rhode Island	$11.48
Kansas	$19.85	South Carolina	$17.07
Kentucky	$16.70	South Dakota	$25.33
Louisiana	$16.98	Tennessee	$17.41
Maine	$18.69	Texas	$15.49
Maryland	$13.36	Utah	$15.12
Massachusetts	$9.83	Vermont	$20.13
Michigan	$15.27	Virginia	$14.13
Minnesota	$14.81	Washington	$13.37
Mississippi	$21.97	West Virginia	$19.25
Missouri	$18.32	Wisconsin	$15.94
		Wyoming	$25.11

August 8, 1996

In the Matter of
Implementation of the Local Competition Provisions in
the Telecommunications Act of 1996 (CC Docket No. 96-98)
and
Interconnection between Local Exchange Carriers and
Commercial Mobile Radio Service Providers (CC Docket No. 95-185)

Separate Statement of Chairman Reed E. Hundt

This order is the most pro-competitive action of government since the break-up of the Standard Oil Trust. I hope the whole country will join in common acknowledgement of all those who made this possible.

The private sector was ably represented, and provided us with much useful information and suggestions.

I specifically acknowledge and thank my colleagues, Commissioners Quello, Ness and Chong, and their staffs, all of whom contributed greatly throughout this process.

I would also especially thank Cheryl Parrino, President of the National Association of Regulatory Utility Commissioners. Her advice and counsel have been invaluable. Thanks also go to the two individuals who served as Chair of NARUC's Communications Committee during this period, Ken McClure and Lisa Rosenblum. I also thank the many other state commissioners from around the country who took time to discuss these matters with us, and who sent their staffs here for extended meetings on all these issues. I would also especially thank Chairman Dan Miller of the Illinois Commerce Committee who detailed one of his staff members, Augie Ros, to the FCC.

I owe a special debt of gratitude and respect to John Nakahata, my Senior Legal Adviser. John's brilliant, indefatigable, incisive and comprehensive work was essential to the triumph of analysis and policy that is in this order.

The highest commendations, however, go to the FCC staff, superbly led by Regina Keeney and Richard Metzger. I would like specifically to recognize each of the dedicated members of the Commission's staff who contributed to this effort, and I apologize if I have inadvertently omitted anyone:

COMMON CARRIER BUREAU

Competitive Pricing Division

Jay Atkinson
Dana Bradford
C. Anthony Bush
Paul D'Ari
Whitney Fox
Aaron Goldschmidt
Lori Huthoefer
Jane Jackson
Cameron Kashani
Dave Konuch
Ed Krachmer
Rich Lerner
Jim Schlichting
Katherine Schroder
John Scott
Les Selzer
Raj Kannan
Bill Sharkey
David Sieradzki
Doug Slotten
Joel Taubenblatt
Matt Warren
Steve Weingarten
Kevin Werbach
Brad Wimmer

Policy and Program Planning Division

Craig Brown
Michelle Carey
Patrick Degraba
David Ellen
Kathleen Franco
Paul Gallant
Lisa Gelb
Jason Grant
Florence Grasso
James Graves
Adam Guglielmo
Kalpak Gude
Matt Harthun

Policy and Program (cont.)

Christopher Heimann
Cindy Jackson
Radhika Karmarkar
Jason Karp
Linda Kinney
Anil Koshy
Stuart Kupinsky
Cheryl Leanza
Mindy Littell
Debbie Maisel
Carol Mattey
Robert McDonald
Susan McMaster
Makysha J. Moton
Janice M. Myles
Brent Olson
Claudia Pabo
Staci Pies
Michael Pryor
Augie Ros
Tonya Rutherford
Cecilia Sangley
Blaise Scinto
Ann Stevens
Donald Stockdale
Jeannie Su
Robert Tanner
Melissa Waksman
Richard Welch
Tracy Wilson
Jim Yancey

Accounting and Audits Division

Ken Moran
David Ahn
Leo Bridge
Chuck Needy

Common Carrier Bureau (cont.)

Enforcement Division

Adrien Auger
Anita Cheng
John Muleta

Industry Analysis Division

Tom Beers
Nasir Khilji
Jim Lande
Peyton Wynns

Network Services Division

Judy Albert
Renee Alexander
Lisa Boehley
Rich Cameron
Erin Duffy
Andy Firth
Octavia Florence
Gregory Forbes
Mary DeLuca
Pam Gerr
Marian Gordon
Bill Howden
Amy Lesch
Geri Matise
Kent Nilsson
Vin Paladini
Scott Shefferman

Office of the Bureau Chief

Regina Keeney
Kathie Levitz
Richard Metzger
Mary Beth Richards
Larry Atlas
Greg Rosston
Anna Gomez
Melissa Newman
Tim Peterson
Mindy J. Ginsburg
Andre Copelin
Shirley Chisolm
Lisa Bray
Chris Day
Brian Hughes

INTERNATIONAL BUREAU

Don Gips
Ruth Milkman
Fern Jarmulnek
Kerry Murray
Susan O'Connell

CABLE SERVICES BUREAU

Meredith Jones
John Logan
Libby Beaty
Barbara Esbin
Paul Glenchur
Alexis Johns
JoAnn Lucanik
Mike McMenamin
Tom Power
Len Smith
Les Smith
Nancy Stevenson

OFFICE OF GENERAL COUNSEL

Bill Kennard
Margie Bertman
Nick Bourne
Pat Carney
Sharon Diskin
Doron Fertig
Sheldon Guttmann
John Ingle
Aliza Katz
Joel Kaufman
Tom Koutsky
Jeff Lanning
Sev MacPete
Jim Olson
Sonja Rifken
Larry Schecker
David Solomon
Susan Steiman
Suzanne Tetreault
Debra Weiner
Chris Wright

OFFICE OF ENGINEERING AND TECHNOLOGY

Jim Keegan
Bob Kimball

OFFICE OF PLANS AND POLICY

Joe Farrell
Bob Pepper
Elliot Maxwell

OFFICE OF PUBLIC AFFAIRS

Susan Lewis Sallet

WIRELESS TELECOMMUNICATIONS BUREAU

Michele Farquhar
Karen Brinkmann
Jim Coltharp
Walt Strack
Daniel Grosh
Kathy O'Brien
Jeff Steinburg
Rhonda Lien
Zenji Nakazawa
David Nall
Jay Markley

PRINTING AND GRAPHICS BRANCH

Dan Walker
Tyrone Campfield
Ronnie Murray
Carlyn Walker

STATEMENT OF
COMMISSIONER JAMES H. QUELLO

August 8, 1996

Re: Interconnection Report and Order

Today marks the end of the pre-competitive era in local telephone service. By our vote today the Commission implements rules that will introduce competition into this last monopoly telecommunications market.

Our Report and Order refers to these rules as the first part of a trilogy that also includes future universal service and access charge reform. This is, to be sure, true. But I must confess that I also see today's action as not the first, but rather the third and final part, of a different trilogy -- one whose first two parts were the introduction of competition into the long-distance telephone market and the divestiture of the Bell Operating Companies from AT&T. These first two events made local telephone competition inevitable; today we usher it in.

Any Commissioner would be privileged to have served during one of these events. I have been lucky enough to have seen all three. From this perspective, then, I would offer several thoughts to the parties most immediately affected by today's decision.

First, to the public, I would say: unparalleled changes in the array of telecommunications services available to you, as well as in the companies that provide them, are going to occur. As competition proliferates and prices fall, economic growth will also occur, and that too will benefit all of us. This is the vision of the 1996 Act, and it is the goal of the rules we adopt today.

To those companies that seek to offer competitive local telephone service, I would say: the rules we adopt today attempt to provide the regulatory assistance you need to enter a market in which your competitor not only possesses a monopoly, but also controls the facilities upon which you must depend to compete. But even so, our rules are pro-competition, not pro-competitor. They are intended to make it possible for you to enter the market on fair and equitable terms, but not to so alter the market that entry occurs even where it otherwise might not. We have opened the door, but we have not paved the way.

To the wireless communications providers, I would say: we have heard and understand your concerns regarding the differences in your technical and market configurations and have, therefore, expressly reserved federal jurisdiction under Section 332. Nevertheless, it is important that our decisions implementing competition be technology-neutral and

provide an opportunity for negotiations under the comprehensive interconnection regime embodied by Congress in Section 251. We will presume good faith negotiations by all but stand ever vigilant to consider and resolve instances of discriminatory treatment.

To our state commission counterparts, I would say: with today's action, we effectively pass you the pen. It is now your responsibility to write the rules and set the prices and terms that will make Congress's vision of competition a reality. To provide added flexibility and to make this process administratively easier, we have also provided ranges of proxy prices that can be used until, or even instead of, state-specific rates are set. Our decision today borrows from and builds on the experience of those of you who are grappling with statewide competition issues. This has, in sum, been a collaborative process. It must continue to be a collaborative process if we are collectively to succeed.

To small telephone companies, I would say: our Report and Order relies largely on state commissions to implement the provisions of the law that ensure that competition will be introduced in a way that is sensitive to your unique circumstances. We cannot, and indeed would not want to, perpetuate what one small company has called a "reasonable, investment-backed expectation to hold competitive advantages over new market entrants." But while we will not guarantee your current profit margins, we are also confident that state decisions will assure that competition in your service areas will take hold in a reasonable manner.

To the Bell Operating Companies and other large independent local telcos, I would say: these rules will bring about competition. You will open your markets to competitors, and in return you will become competitors in other markets. The rules we adopt today will enable you to do both things. What they will not enable you to do is avoid the first, but obtain the second. These rules will bring change, not catastrophe; they will bring opportunity, not oblivion. It will be a different world, but one in which you will continue to play a vital role.

Finally, I must acknowledge that this day would not have come without the tireless dedication and tremendous talents of Gina Keeney and her gifted Common Carrier Bureau staff. The Chairman will, I am sure, commend each of you at length, and I will leave that privilege to him. For my part I want to express my thanks to the entire CCB "Dream Team," and especially to its captain, Richard Metzger. This job could literally not have been done this well in such short time without you, and for that you have my profound respect and appreciation.

August 8, 1996

SEPARATE STATEMENT
OF
COMMISSIONER SUSAN NESS

Re: ***Implementation of the Local Competition Provisions of the Telecommunications Act of 1996***

Today we are fulfilling one of the most important responsibilities assigned to us by the Telecommunications Act of 1996 -- writing the rules that will achieve Congress's vision of fair and robust competition in all telecommunications markets. We are doing so with utmost fidelity to the letter and the spirit of the statute.

At the heart of the legislation is a bold commitment to supplant monopoly with competition. Based on the abundant benefits that have flowed to consumers as a result of competition in the provision of long distance services, information services, and customer-premises equipment, Congress decreed that the opportunity for competition be extended to the local telephone market. It ordered that barriers to entry be swept aside -- and that pathways to competitive entry be opened.

Sections 251 and 252 of the 1996 Act establish the foundation for this competition. On this foundation must be built radically different relationships than those that have previously existed -- between incumbent local exchange carriers and new entrants, between state and federal regulators, and between regulators and industry.

Congress recognizes that, to effectuate a new policy of local competition for markets that have traditionally been protected monopolies, a national policy framework is essential. But it also recognizes the need for flexibility. This balance is reflected in the 1996 Act, which sets forth the key principles in the statute, instructs this Commission to formulate implementing regulations, and assigns many of the duties pertaining to specific carriers and agreements to the state commissions.

At the same time, Congress encouraged voluntary negotiations between incumbent local exchange carriers and new entrants. Although voluntary agreements are not subject to Section 251 and our implementing regulations, we are aware that the negotiations may be influenced by the legislative and regulatory regime for arbitrated agreements. The "backdrop" of our rules should encourage, not impede, the successful negotiation of voluntary agreements.

The 1996 Act intends that the benefits of competition be available in all 50 states, not some lesser number. Congress recognized that some states were already making progress in the introduction of local competition, and it sought to permit that progress to continue. Consistent with the statute, the rules we promulgate today will enable those states in the vanguard to continue on their procompetitive course. Other states are being given the tools necessary to accelerate their progress. All states will have considerable responsibility for effectuating the transition to competition within their own borders.

Our decisions in this proceeding are the product of extensive discussions with state regulators concerning a wide variety of legal, economic, policy, and practical issues. The insights that have been shared with us by state regulators have guided us throughout our deliberations. Maintaining a successful partnership between state and federal regulators will be essential to fulfill the legislative expectations underlying the new structure set out in Sections 251 and 252 of the 1996 Act.

Out duty is to establish rules that are procompetition, not pro-competitor. Competitive access providers, cable companies, interexchange carriers, wireless companies, and others will all bring unique skills and strategies to the new competitive arena. Today's ruling, and the decisions that will follow from the state commissions, will enable all of these entities to compete robustly, and without hindrance based on other entities' entrenched market power.

In today's order, we are also facilitating new entry by identifying a core set of unbundled network elements that new entrants may obtain, singly or in combination, from incumbent LECs, to create new and innovative services. We send correct economic signals to potential entrants by requiring the use of forward-looking pricing principles. We promote voluntary negotiations by establishing minimal rules regarding the duty to bargain in good faith. We are providing immediate relief from CMRS-LEC interconnection agreements that violate fair play and flout our existing rules. In these and other respects, we act forcefully to bring to the local telephone market the dramatic change Congress intended.

Yet we also maintain fair treatment to the incumbent local exchange carriers. They are entitled to fair prices for the services and elements they offer, and our pricing principles accordingly reject costing methods that ignore the LECs' current network architecture or deny recovery of reasonable joint and common costs. The special needs of smaller incumbents, especially rural telcos, must be addressed with extra care, and just as Congress intended, we safeguard them today.

Some have expressed concern about the effect on universal service of flash-cut changes in market rules and pricing principles. We have listened -- and responded. With an abundance of caution, we have established an access charge transition of limited duration that will reduce the exposure of incumbent local exchange carriers to the sudden loss of access charge revenues. But we have also established for the long-term the principle that prices for network elements, transport and termination, and collocation must be based on costs -- not hidden subsidies that distort market forces.

We have committed to expeditious completion of the universal service proceeding, where we must make subsidies explicit and both eligibility and funding must become competitively neutral. On a parallel track, we must complete reform of access charges, to eliminate uneconomic incentives that distort investment decisions. A rational economic structure for all services and elements is vital to sustainable competition.

Only when the universal service, access reform, and interconnection rules are all in effect will local telephone subscribers really begin to see the full benefits of marketplace competition: lower prices, new services, and more choices. As market power wanes, the role of government will diminish as well.

Competition will take time to emerge. Expectations are high, but the reality will inevitably lag behind. As the process unfolds over the coming months and years, there are bound to be unforeseen circumstances, unintended consequences, and efforts to game the process. We will remain vigilant, and will reevaluate and refine our rules as necessary to promote competition that is both robust and fair.

Following the mandate of the Telecommunications Act of 1996, this Commission will not shrink from taking the steps necessary to enable the benefits of competition to reach consumers throughout the nation.

August 8, 1996

Separate Statement of

Commissioner Rachelle B. Chong

Re: *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket No. 95-185; Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252.*

The passage of the Telecommunications Act of 1996[1] marked the end of more than sixty years of monopoly style regulation. The changes wrought by the 1996 Act on the telephone industry are dramatic and comprehensive. I write separately to emphasize my strong belief that the pro-competitive path we have unanimously chosen in this interconnection order is the right one.

On the day the 1996 Act became law, the Commission embarked on a challenging journey to help implement the new statute. Our final destination has been clearly delineated by Congress. We are "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."[2]

True to this charge, we have resolved to act quickly and decisively to open all telecommunications markets to competition, to provide pricing methodologies that will drive rates toward cost, and to provide a national policy framework that will achieve this restructuring of the industry in an orderly and efficient manner. The rules in this item do not favor any particular industry or player over another, but instead free them from outdated regulatory restraints in order to compete with each other.

The 1996 Act opens up the local telephone network to competitors, and provides them with unprecedented access through an interconnection framework.[3] The Act provides three

---

[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 *to be codified at* 47 U.S.C. §§ 151 *et. seq.* (1996 Act).

[2] S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996).

[3] Interconnection refers to the physical linking of two networks for the mutual exchange of traffic.

methods of entry through which a competitor may enter the local telephone market: (1) full facilities-based entry; (2) purchase of unbundled elements from the incumbent local exchange carrier (LEC), i.e. network "piece parts;" and (3) resale, which gives a competitor the ability to purchase an incumbent LEC's retail service at a wholesale price and repackage it for sale to the competitor's own end user.

Facilities-based Competition. The first entry option -- facilities-based competition -- represents the most dramatic departure from our current bottleneck monopoly structure. A full facilities-based competitor would offer a myriad of distinct services through separate facilities to its subscribers, and thus providing consumers with the benefits of head-to-head competition. As a practical matter, however, we do not expect a market typified by full-fledged facilities-based competition to blossom overnight. These networks or systems must be planned, financed and constructed over time. As a result, the other two entry avenues -- the purchase of unbundled elements and resale -- take on a special importance in the near term to bring swift competition to the local marketplace.

Unbundled Elements. Some new entrants already have some network infrastructure in place, and lack only a few critical components in order to provide local exchange service to consumers. For example, today's cable operators have a coaxial wire that passes over 96.6% of the TV households in America.[4] If a cable operator can access the remaining necessary network elements from the incumbent LEC, the cable operator would be only a step away from providing local telephone service over its upgraded network. This example points out why it is essential for new entrants to obtain access to those network piece parts. In our order, we set forth a minimum list of unbundled network elements that incumbent LECs uniformly must make available to new entrants upon request. The state commissions may expand upon this list. We believe that this action will give new entrants what they need so competition is "jump started."

Resale. Resale is another critically important entry strategy because three types of new entrants stand to benefit. First, facilities-based competitors that want to immediately enter the market prior to completing their own networks can use resale as a transition mechanism. Second, facilities-based competitors whose existing infrastructure does not overlap the incumbent LEC's service area, may choose to use resale to ensure that it can offer a competing local service package within the same service territory as the incumbent LEC. Third, new entrants who do not intend to offer facilities-based competition will be able to compete immediately in the local market by purchasing discounted services of the incumbent LEC. For all of these categories, our decision provides a viable avenue for immediate market entry.

Free Market Negotiations. I highlight that the 1996 Act has made the mechanism for entry a *free market* negotiation process between the incumbent LEC and any potential new

---

[4] Paul Kagan Associates, Inc., *Marketing New Media*, Mar. 18, 1996.

competitor. Under Section 252(a)(1), the Commission's Section 251 rules play no role if an incumbent LEC and a new entrant reach a purely voluntary agreement, and the state commission approves it through the process set forth in Section 252.

Need for Minimum National Baselines. It is only if the carriers are unsuccessful in their voluntary negotiations that government steps in. The Act provides that the state commissions arbitrate the disputes. In today's order, we set forth a baseline of terms and conditions for an arbitrated interconnection agreement. I support this action for three reasons. First, because interconnection matters are very complex and technical, I believe that minimum national guidelines will help parties lower their transaction costs and will help drive them to reach their voluntary agreements much faster. At the outset of their voluntary negotiations, parties will understand what their minimum rights will be in a subsequent state commission arbitration process; it is our hope this may encourage earlier agreement.

Second, a baseline of terms and conditions simplifies the state commission arbitration process. A baseline enables a state commission to quickly approve an agreement and thus rapidly introduce competition. The presence of a baseline minimizes any regulatory delay that might result if a state commission were to establish from scratch its own pricing methodology or conduct a proceeding to identify network elements that must be unbundled.

Third, in establishing some national minimum baselines, we greatly aid new entrants who have national or regional strategies. Without such baselines, these competitors would face a "patchwork quilt" of differing state regulatory requirements that may create a potential entry barrier by increasing their entry costs and causing substantial delay. Thus, it is my view that these baselines promote swift competitive entry, which in turn will lead to the earlier introduction of competitive services to consumers.

Access Charge Transition. Although we take a great leap forward toward competition with this interconnection order, our goal in making local telephone competition a reality will not be complete until we finish universal service reform and restructure our current access charge regime. Our order notes that the Act sets forth a specific time frame by which the Commission must issue final rules as to interconnection (August 1996) and universal service reform (May 1997). Because of the time differential between these dates, and in order to avoid undue disruption of the incumbent LECs' ability to support universal service, I have supported our decision to require new entrants when purchasing unbundled elements to pay a portion of certain access charges until no later than June 30, 1997. My support for the establishment of a short term access charge transition scheme is premised on the Commission's firm commitment to complete universal service and access charge reform by the first half of 1997. I underscore my determination that the interim access charge mechanism proposed herein is of a finite duration. I can foresee no circumstance upon which it would be extended beyond the dates set forth in our order.

Pricing Methodology. Prices of interconnection and unbundled elements, along with prices for transport and termination and resale, are all crucial to any interconnection

agreement. Again, should the parties voluntarily agree on such prices, these agreements will be submitted to the states for approval and there is no government intervention in the process.

If carriers cannot agree, however, today's decision makes clear that the FCC will *not* set these prices. The Act provides that the appropriate state commission will step in to set prices. To help guide state commissions as they set prices according to local conditions, we have established methodological pricing principles that are consistent with the Act's cost-based pricing provisions. We have asked the state commissions to use the cost-based pricing methodology described in our order when they conduct an economic cost study to set their state specific rates. A clear benefit of this approach is that such a national framework will encourage the swift establishment of a common, pro-competition understanding of pricing principles among the states.

We also have established certain default proxies that states will use in the interim, if they have not completed a cost study during an arbitration, or if they lack the necessary resources to initiate their own cost study. It is my view that these default proxies, which are either price ceilings or price ranges, will greatly speed competition. For example, in a situation where the state commission has not yet completed a cost study but must render a decision on specific pricing issues in an arbitration pursuant to the deadline imposed by Section 252(e)(4), the default proxies will assist the state commission in resolving the pricing issues quickly and in a way consistent with the Act's cost-based pricing principles.

I emphasize that a state commission has the flexibility to set a specific rate that is either above or below the default proxy ceiling or range if it has conducted its own cost study consistent with the pricing methodology set forth in our order. The default proxy is only an interim mechanism and it may not be relied upon once a state commission has completed its own economic cost study.[5]

CMRS-LEC Interconnection Issues. In our order, I have supported our decision to allow CMRS-LEC interconnection matters to be governed by the Sections 251/252 provisions, while continuing to acknowledge our continuing jurisdiction pursuant to Section 332 over CMRS-LEC interconnection matters. In doing so, we have declined to opine on the precise extent of our Section 332 jurisdiction over CMRS-LEC interconnection matters, however. I emphasize that by opting to use the Section 251/252 framework, we are not repealing our Section 332 jurisdiction by implication or rejecting Section 332 as an alternative basis for jurisdiction.

---

[5] It is unfortunate that we did not have enough of a record in this proceeding to decide what would be an appropriate proxy for paging carriers' termination costs or to set a default proxy. I am committed to moving forward with a further rulemaking proceeding on this issue as quickly as possible.

While we have generally crafted our interconnection rules not to favor any particular industry, player or technology over another, we cannot shut our eyes to inherent differences between some classes of carriers' services that may pose potential problems when we seek to apply our new interconnection rules. I believe that should the need arise in the future, we should not hesitate to adapt some of our general interconnection rules to recognize the unique nature of particular classes of service providers, such as CMRS providers. It is for this reason that I supported the Commission's decision to reserve its right to exercise jurisdiction over LEC-CMRS interconnection under Section 332.

There are several differences that set wireless CMRS providers apart from some of the other telecommunications carriers that will avail themselves of the Sections 251 and 252 interconnection framework. First, when adopting Section 332 in 1993, Congress created a national regulatory framework for CMRS providers, and granted the FCC authority to preempt states from entry and rate regulation. Congress made clear that its intent was to "foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure."[6] This recognition that CMRS services are uniquely interstate in scope was apt. CMRS service areas, which are established federally, can encompass more than one state jurisdiction.[7] Congress was rightly concerned that imposing multiple state regulatory schemes on CMRS providers may prove unduly burdensome, cause delay, and otherwise inhibit the industry's growth. Notably, Congress did not repeal Section 332 when it provided new Sections 251 and 252 in the 1996 Act.

Second, CMRS providers have suffered past discrimination at the hand of the LECs and by certain state commissions with regard to interconnection matters. Today's record is replete with examples of LECs that have significantly overcharged CMRS providers for past interconnection. Further, in violation of our rules, our record reflects that in some cases, LECs have refused to pay CMRS providers for calls terminated by LECs on the CMRS networks, while other wireline carriers have received such compensation from the LECs. In

---

[6] H.R. Report No. 103-11, 103rd Cong., 1st Sess. 260 (1993).

[7] For example, Personal Communications Service (PCS) providers in the Washington - Baltimore Major Trading Area (MTA) are subject to six jurisdictions -- Pennsylvania, Delaware, Maryland, Virginia, West Virginia and the District of Columbia -- due to the large size and location of the federally set service areas. Should one of these PCS providers need to arbitrate an interconnection agreement pursuant to Section 251 and 252, such PCS provider could be subjected to as many as *six* state arbitration proceedings. This scenario could impose undue burdens, such as increased transaction costs, regulatory delay, and the potential for inconsistent results, for CMRS providers with interstate service areas. For this reason, we reserve our right to in the future to use Section 332 as an alternative basis for jurisdiction over CMRS providers faced with this type of a dilemma.

other instances, LECs have required certain CMRS providers to pay for the traffic the LEC carrier originates and terminates on the systems of the CMRS provider. These problems have been compounded by certain state commissions who have limited access by CMRS providers to more reasonable interconnection rates afforded by LECs to other wireline carriers.

In this order, we have taken a variety of measures to remedy this discrimination and to ensure that CMRS providers are placed on an even footing with other telecommunications carriers when obtaining LEC interconnection. I am particularly pleased that we will allow CMRS providers with current interconnection agreements that provide for non-mutual compensation an opportunity to renegotiate those agreements under the framework of Sections 251/252, without incurring any early termination penalties. In light of the past discrimination CMRS providers have experienced, however, I would have taken two additional steps.

First, I would have extended the "fresh look" opportunity to all CMRS providers -- not just those with non-mutual compensation arrangements. Our decision was to limit relief in this instance to contracts that are clearly unlawful because they violate Section 20.11 of our rules. Section 20.11, however, requires not only that CMRS-LEC interconnection agreements comply with principles of mutual compensation, but also that each carrier pay *reasonable* compensation. I believe that the record in this proceeding clearly demonstrates that the rates the LECs have charged CMRS providers have far exceeded their costs and thus could not fairly be characterized as "reasonable" compensation.

Second, instead of requiring the CMRS providers to continue paying their current interconnection rates, I would have permitted CMRS providers to immediately begin paying the default proxy rate while their interconnection arrangements were being renegotiated.

It is my hope that on a going-forward basis, CMRS providers will be able to obtain fair, reasonable and non-discriminatory interconnection rates under the terms of today's decision. For reasons of simplicity and regulatory parity, it makes sense to me to have a single regulatory scheme pursuant to Sections 251 and 252 apply as to all incumbent LEC interconnection matters. Bearing in mind Congress' concerns about the interstate nature of the CMRS industry, however, I have concerns that the state-by-state arbitration process may pose undue burdens on, or otherwise hinder the growth of, the CMRS industry. If it does, I would not hesitate to invoke our Section 332 jurisdiction if I believe that the framework we impose today is having adverse impacts on the CMRS industry.

16253 •U.S. GOVERNMENT PRINTING OFFICE: 1997-417-484/60009

sentence is relevant only because the Eighth Circuit erroneously construed that sentence to *prohibit* FCC combination rules notwithstanding their nondiscrimination rationale.

The LECs argue (*id.* at 46) that Rules 315(c)-(f) cannot be supported by the nondiscrimination requirement because the FCC did not formally "cite" that requirement in the subsection of the Order adopting those rules. But that was the same subsection that adopted Rule 315(b), and this Court had no difficulty recognizing and upholding the nondiscrimination basis for that rule. *Iowa Utils. Bd.*, 525 U.S. at 395.

Finally, the LECs contend that no nondiscrimination concern is implicated here because the absence of Rules 315(c)-(f) would simply leave all carriers on an "equal footing." Bell Br. 45. That unsupported assertion simply ignores the FCC's well-supported finding (Order, ¶ 293 (JA 296)) that it would "in practice" be "impossible for new entrants that lack facilities and information about the incumbent's network" to combine the incumbents' elements themselves, and that absent these rules competitors would be "seriously and unfairly inhibited" in their ability to use network elements.

CONCLUSION

For the reasons stated, the Eighth Circuit's decision should be reversed insofar as it vacated Rules 51.315(c)-(f) and 51.505(b)(1).

Respectfully submitted,

MARK C. ROSENBLUM
LAWRENCE J. LAFARO
RICHARD H. RUBIN
AT&T CORP.
295 North Maple Avenue
Basking Ridge, NJ 07920
(908) 221-8410

DAVID W. CARPENTER*
PETER D. KEISLER
DAVID L. LAWSON
STEPHEN B. KINNAIRD
C. FREDERICK BECKNER III
SIDLEY AUSTIN BROWN & WOOD
1722 Eye St., N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

July 23, 2001